Supreme Court, U.S.
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No. 05-791

IN THE
Supreme Court of the United States

JEFFREY R. GOLIN, ELSIE Y. GOLIN, NANCY K. GOLIN
Petitioners

v.

CLIFFORD B. ALLENBY, DIRECTOR DEPARTMENT OF DEVELOPMENTAL SERVICES, STATE OF CALIFORNIA, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; H. DEAN STILES (OFFICE OF LEGAL AFFAIRS OF CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES) IN HIS INDIVIDUAL AND PERSONAL CAPACITY, COUNTY OF SANTA CLARA; JAMIE BUCKMASTER (SANTA CLARA COUNTY ADULT PROTECTIVE SERVICES; JOSE VILLAREAL, MALORIE M. STREET (SANTA CLARA COUNTY OFFICE OF PUBLIC DEFENDER) EACH IN THEIR OFFICIAL, INDIVIDUAL AND PERSONAL CAPACITIES; SAN ANDREAS REGIONAL CENTER, INC. ("SARC"); SANTI J. ROGERS, MIMI KINDERLEHRER, TUCKER LISKE (SAN ANDREAS REGIONAL CENTER), EACH IN THEIR INDIVIDUAL AND PERSONAL CAPACITIES; NANCY J. JOHNSON (BERLINER COHEN); CITY OF PALO ALTO; LORI KRATZER (PALO ALTO POLICE DEPARTMENT) IN HER OFFICIAL AND INDIVIDUAL CAPACITY; EMBEE MANOR, EDNA MANTILLA IN HER INDIVIDUAL AND PERSONAL CAPACITY; AND DOES 1-50, DEFENDANTS-APPELLEES.
Respondents

On Petition for a Writ of Certiorari
To The United States Circuit Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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i. QUESTIONS PRESENTED

1. Whether, in light of *Exxon*, Section 1983 claims are considered "interfering with ongoing" state court proceedings under the existing *Younger* doctrine, where federal claims do not challenge differing state jurisdiction, considering the long-established system of dual federal and state jurisdiction, notwithstanding "Our Federalism" and comity?

2. Whether a state conservatorship may constitutionally confer *de facto* absolute immunity to a conservator from Section 1983(5) vindication of deprivations of constitutional rights, torts, injuries, and liabilities committed to an adult conservatee and their parents, by virtue of state granted powers of exclusive standing and representation?

3. Whether lifelong caregiving parents of developmentally disabled adult children have substantive constitutional rights in the preservation of family integrity under the First Amendment's broad right of association and the 14th Amendment's general substantive due process protections, similar to parents of minor children, in representing their children in an independent Section 1983 federal civil rights lawsuit against state actors, where a state conservator is named as a defendant?

4. Whether adult developmentally disabled children and their parents have a fundamental liberty interest in their mutual companionship and association?

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey R. Golin and Elsie Y. Golin, parents, next friends and lifelong caregivers of Nancy K. Golin, respectfully petition this Court for a writ of certiorari to review the denial of the United States Circuit Court of Appeals for the Ninth Circuit, dismissing Appellants' 42 U.S.C. §§1983, 1985(3) lawsuit.

CITATION OF OPINIONS AND ORDERS

None of the opinions below are reported, The following orders are included in Appendix A:

August 15, 2005: Order Denying Petitioners' Petition for Rehearing En Banc, Three Judge Panel (Kleinfeld, Tajima, Thomas), Ninth Circuit Court of Appeals (Case No. 04-15900) (App. a-2).

June 22, 2005: Memorandum of the Ninth Circuit Court of Appeals Three Judge Panel, (Kleinfeld, Tajima, Thomas), dismissing Section 1983 Civil Rights Lawsuit, (Case No. 04-15900, cited as 2005 WL 1475615 (9th Cir.(Cal.)) (App. a-3).

April 6, 2004: Orders of the District Court dismissing Plaintiffs' Complaint on Section 1983 Civil Rights Lawsuit, Northern District of California (Case No. cv 03-04752 WHA) (App. a-6).

November 10, 2003: Orders of the Superior Court of Santa Clara County probate division granting conservatorship of Nancy K. Golin enumerating six powers to be removed from her and granted to the California DDS for an indefinite period. (Case No. 1-02-PR-151096) (App. a-20).

BASIS FOR JURISDICTION

The Ninth Circuit delivered its judgment and opinion on June 22, 2005. They denied a petition for rehearing en banc on August 16, 2005. Justice O'Connor on November 9, 2005 granted petitioners a 30-day extension to file this petition to and including December 14, 2005. This petition is not sought under Rule 12.5. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1). The district court had jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343. No other rehearing has been sought or is available from this judgment except through this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As cited in the Table of Authorities. The full citation of these provisions is lengthy and is included in Appendix C.

STATEMENT OF THE CASE

A Section 1983(5) Civil Rights lawsuit was filed by petitioning parents *pro se* on behalf of themselves and their daughter Nancy Golin on October 23, 2003[1] in U.S. District Court, Northern District of California, Hon. William H. Alsup presiding, as Case No. 03-04752. This suit arose out of the unconstitutional deprivation of liberty and denial of First, Fourth, Sixth, Eighth and Fourteenth Amendment violations by state actors - in fraudulently conspiring to remove Nancy, a harmless developmentally disabled (DD) autistic adult child, from her caring family, without warrant, emergency or probable cause;[2] detaining her involuntarily at a psychiatric ward; falsely imprisoning her upon expiration of statutory authority; hiding her for close to a year from parents and friends; forging her name to a voluntary Individualized Program Plan (IPP); causing emotional and physical injuries; denying her and her parents fundamental familial liberty interests and due process of law. The injuries occurred prior to state conservatorship adjudication. The suit also claimed subsequent wrongs causing additional emotional and physical injuries, as well as pervasive denials of the family fundamental liberty interests and absence of due process (App. a-8). The petition was dismissed by District Court on March 25, 2004 (App. a-6).

Petitioners appealed to the Ninth Circuit Court of Appeals on May 4, 2004, Case No. 04-15900. The unpublished June 22, 2005 memorandum in its five-paragraph opinion, handed down without oral argument, ignored the intervening *Exxon* decision of this Court, and affirmed the District Court's misstatement of *Rooker-Feldman*, while applying *Exxon* to other cases decided concurrently. Without analysis the Ninth sanctioned the District Court's: denials. The courts below failed to recognize the fundamental rights of caregiving parents to care and companionship with their adult disabled children. These are rights over which the highest state and federal

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[1] The Section 1983 claim, filed on October 23, 2003 (App. a-8) right after the conservatorship decision took months to prepare and needed to be timely filed in order to avoid running afoul of statutes of limitations. Petitioners asked, "*If the conservatorship had been awarded to the parents instead of the state, would there then still be any causable action pursued by the parents against the state for federal civil rights violations*? (AOB at 36).

[2] *Smith v. Riverside County*, 2005 WL 1473958 (9th Cir., 2005) (App. a-40) held this conduct to violate 4th amendment protection against unreasonable personal seizure, see *Tenenbaum v. Williams*, 862 F.Supp. 962 (1994), *O'Donnell v. Brown*, 335 F.Supp.2d 787. (2004), *Hollenbeck v. Bouvert*, 330 F.Supp.2d 324 (2000).

courts are in conflict, and which this Court should review.

After a short hearing on March 23, 2004, the District Court dismissed, based on its misperception that the Section 1983 claims sought to appeal the conservatorship decision (App. a-8; *infra* 13), and its reliance on *Rooker-Feldman* (App. a-13), Domestic Relations (App. a-17) and *Younger* Abstention (App. a-16) doctrines. It denied next friend standing relying improperly on judicial notice of the challenged extrinsic state court findings (App. a-12) yet on appeal, never rendered preclusive, to reject the parents qualifications despite their invoking this Court's the three-prong *Whitmore*[3] test. It concluded due process in state court was adequate, as state statutes provided a mechanism for removal of the conservator (App. a-15), denied malicious prosecution claims (App. a-18) even though charges were dismissed and probable cause not shown, refused to grant time to seek representation or to alternatively appoint requested counsel (App.a-12), and refused to appoint a *guardian ad litem*.

A Petition for Rehearing *en banc* was filed in the U.S. Circuit Court of Appeals on July 6, 2005. Rehearing en banc was denied August 16, 2005, causing this petition. We petition this Court for reversal in this Petition for Certiorari.[4]

A. Nancy and Her Parents Prior to State Intervention

Nancy Golin is a 35-year-old autistic adult, developmentally disabled (DD) since birth (RT-10/3/03,[5] pp 33-35, 44-45). She had never been institutionalized (RT-10/3/03 pp 46-48, 63-64). Since age 22, she has epilepsy, controlled by anti-seizure medications (AER-A1[6]). She is non-aggressive, has never been diagnosed with mental illness, needed psychiatric medications, or ever been charged with a crime. She has a propensity to wander (RT-10/1/03, p 186; AER-B11, 11/29/01). She cannot read or write, and speaks few words, yet understands and communicates effectively with gestures. She has always been outgoing and gregarious without self-injurious behaviors.. (RT 10/3/03 p51, lines 20-22). She is ambulatory, can toilet, dress,

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[3] *Whitmore v. Arkansas*, 495 U.S. 149 (1990).

[4] Alongside the Section 1983 claim, a 28 U.S.C. §2254 petition for Habeas Corpus *Golin v. Allenby* No. 3-03-cv-05855 was filed December 12, 2003 in District Court and was dismissed concurrently with this Section 1983 suit appealed to the Ninth Circuit, and denied certiorari by this Court on February 22, 2005.

[5] (RT-m/d/y, p No., [line L])=Reporter's Transcripts of oral proceedings for month/day/year in state probate Court case 1-01-PR-151096, at page No. P.

[6] (AER-Xp)= Appellants' Excerpts of Record--Exhibit No--page no. within tabbed section, Exhibits A-Z, filed below in Ninth Circuit US Court of Appeals, Case No. 04-15900, filed December 2, 2004.

feed herself, and tie her own shoelaces. She and her parents were profoundly attached and always together (RT-10/7/03 pp 106-109).

The parents are active 43-year-married retirees, who until 2004 owned and operated a lighting business they founded in 1990 (AER-S10) to enable them to care for Nancy. Mr. Golin is a former engineer, scientist, technical marketing professional, and private contractor and businessman, with a graduate degree in Physics from MIT. Nancy's mother is an artist and designer; Mrs. Golin is an advocate of individual care (RT 10/3/03 pp 64-69) and a critic of San Andreas Regional Center (SARC), the non-profit corporation exclusively responsible for State DD programs in Santa Clara, Santa Cruz, San Benito and Monterey Counties (*e.g.*, AER-B17), (AER-S12-S15; RT 10/3/03 pp 69-77); (AER-B17).

B. Two Years of Unlawful State Interventions

On November 14, 2001, Nancy wandered from her parents at about 9 p.m. Within five minutes, the parents notified the Palo Alto Police to help in searching. The next morning, the parents' premises were entered, their property searched, Nancy's medications removed, photographs taken, and the parents' explanation that they were just moving in was ignored. Nancy returned on her own, happy and unharmed, about 10:30 am the next day. Subsequently, the Police, uninvited, re-entered the property. The coordinated intervention's unfounded justifications point to a predetermined agenda (AER-B17). The Police stated they would take Nancy to Stanford Hospital for a welfare check. At Stanford ER, the parents were denied access to Nancy and her doctors. Security guards told them Nancy had been placed on a §5150 psychiatric hold, and turned them away on threat of arrest. Nancy had never been alone in a hospital without a parent, and had never been in a psychiatric ward.

The Police informed psych ward doctors that Nancy was the victim of parental abuse and neglect, and made numerous other false and disproved allegations. SARC and Santa Clara County Adult Protective Services (APS)[7] claimed custody without protective custody proceedings. *Until* the police took her,[8] Nancy was not homeless

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[7] Det. Kratzer declined to reallege any of her police report claims when questioned on the witness stand under oath at trial on October 2, 2003, (RT-10/2/03, ; p 108-109; p 131-132; p 138; p 140, lines 14-20; p 152, line 16; and admitted she could have been mistaken about the situation faced with the police photos of the scene (RT-10/3/03, p146, line 20; 142-143) and impeaching testimony (AER-S5-S10).

[8] She was kept in the psych ward against medical advice by APS worker, witness Linda Suk, although warned by Stanford Dr. Luu that "*with the men in the ward,*

(cont'd next page)

(RT-10/7/03, p 173, 174, 182, 183), exhibited no signs of abuse or neglect (AER-S10), had correct blood levels, and had no seizures for several months. Finding no need for treatment, Stanford discharged her two weeks later. Instead of releasing her, SARC took Nancy to a Residential Care Facility (RCF)[9] where her signature was forged to a Individualized Placement Plan (IPP) (AER-F6-9)) in order to qualify as voluntary commitment (AER-F2). Nancy cannot read, write or sign her name, or has the capacity to give such informed consent.

On admission the psych team halved her anti-seizure medication to their notion of "normal" levels, causing a week of protracted *grand mal* seizures. Neurologist consult Dr. Schwartz disagreed on record November 17, 2001, "*her level was good at time of admission*" (AER-T14) and restored her medication levels. Seizures then abated. These levels were the same levels that Mrs. Golin, under the supervision of Nancy's regular board certified neurologist Dr. Howard Belfer of San Mateo Hospital (AER-B1, T20) and Stanford's own clinical neurologists, administered - which the police and APS alleged were "overdosing" (AER-S37-S42) constituting "abuse".

Upon intake, the Police applied for a 72-hour hold, Cal. Welf. & Inst. C. §5150, for psychiatric evaluation alleging "danger to self" (RT-10/2/03, p100) and "grave disability," but physicians dropped the "danger to self" allegation. The Police then applied for an extension to a 14-day hold, Cal. Welf. & Inst. C. §5250, for intensive treatment, alleging "grave disability". Both state laws are inapplicable to merely DD persons[10] or persons who can live safely with family or friends.[11] Application for the §5250 hold was judicially denied (AER-C4) (*See also* (RT-10/1/03 p 189) at a November 26, 2001 in-hospital hearing, of which the parents were not notified and were prevented from attending. Nancy, being mute and incompetent, had no effective representation. The TRO against her parents expired. Yet, when they tried to pick her up, Nancy had been moved to an undis-

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[Luu] did not see it was the most safest place (sic)" (AER-B6, 11/19/01) (RT-10/1/03, p180-4) but APS admitted they "*did not have any safe place for her*" (RT-10/1/03, p185). Nancy showed signs of molestation (AER-S31) when next seen by parents.

[9] State psychologists warned SARC in a December 2001 evaluation (AER-D3) that Nancy would suffer severe psychological abuse from separation anxiety (she waited at the door for her parents to come for her) and told RCF operator Nancy may have been sexually molested while in State care (AER-D2).

[10] Cal. Welf. & Inst. C. §5008(h)(3) (excl. merely retarded) (App. a-52).

[11] Cal. Welf. & Inst. C. §5250(d)(1) (family and friends) (App. a-55). County mental health advocate Jim Rafael warned police Nancy's §5250 detention was inappropriate for DD and could not be certified (AER-B8-B9, 11/26/01).

closed location, violating Cal. Welf. & Inst. C. §§5152 (App. a-54) and 5270.35 (App. a-55), subjecting these parties to civil liabilities under Cal. Welf. & Inst. C. §§5270.10 (failure to release) (App. a-55), 5150 (knowingly false statements) (App. a-53).

The APS telephone records (AER-B) show that APS and SARC were aware of the illegal confinement, "*we are all concerned because nancy is not conserved so…(I)f somehow the clients (sic) found where nancy [was] placed by sarc, and showed up the RCF manager would have a hard time keeping them away, and keeping them from taking nancy if nancy wanted to go with them*" (AER-B5, 11/16/01 (Kinderlehrer)), and admitted [we] "*want to avoid court if at all possible*" (AER-B16, 3/1/02). By November 2002, Nancy suffered injuries at the residential care facility (RCF) including an unreported and untreated broken collarbone, dislocated shoulder (AER-L1-L2), psychotropic drugging (AER-G1), and physical restraints. Records show she wandered 138 times in 12 months (H4-H6). Nancy attempted to escape by using a closet pole to break her bedroom window. At home Nancy had never been subjected to restraints. During supervised offsite visits, Nancy repeatedly begged her parents to take her home pulling them out the door or taking her dad's car key from his pocket and giving it to him (as she had always done to ask to be taken out). APS records show these state actors conspired to concoct criminal charges against the parents, held open for 14 months despite knowing they lacked probable cause (Argument III, fn 51; *infra*, 29).

The Santa Clara County District Attorney brought criminal charges of dependent adult abuse against the parents and they were arrested on or about December 2001. The parents bailed out after one night. Officials attempted to detain Mrs. Golin after bailing out. The charges were dismissed with not guilty pleas on the DA's motion in January 2003 for Mrs. Golin and August 2003 for Mr. Golin.

On April 14, 2002, five months after she was removed, California's Department of Developmental Services (DDS) filed in probate court for limited conservatorship (cf. fn 51; *infra*, 29) under an inapplicable code, Cal. Hlth. & S. C. §§416.5, 416.9 (intended for use by abandoned persons or consenting parents or guardians)[12] (App. a-47,

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[12] *Bellino v. Superior Court of Riverside County*, 70 Cal.App.3d 824, 829 (1977) reviewed portions of the legislative history of Cal. Hlth. & S. C. §416.5, construing that "*it is not surprising that the policy of the State Department of Public Health is 'to refuse to accept appointment as public guardian while a parent or guardian is still alive. This policy is based on the belief that the parents should continue to participate in the planning for their retarded children so long as they are alive and able*" (quoting

(cont'd next page)

a-48) without notice to her parents. DDS Attorney Stiles filed a petition with the probate court to commit Nancy to a State institution, accompanied by a false dementia report. Stiles also misinformed the Court that that Nancy's parents had been "convicted of abusing Nancy" and were in jail (RT 7/9/02, p2), and as excuse for no notification to parents, Stiles misinformed the "whereabouts were unknown" (RT 7/9/02, p 1). After three such hearings, and a Court order, DDS finally notified the parents, who cross-petitioned and appeared on August 20, 2002 and for appointment October 15, 2002.

In November 2002, soon after appointment of an interim conservator, the parents learned Nancy had been taken to SARC-approved psychiatrist Dr. Hector Cerezo, who prescribed Risperdal, a potent psychotropic medication with dangerous side effects, to drug her "as needed" (AER-G1). Subsequently, she suffered tremors, Parkinson's disorder and tardive dyskinesia (TD). Risperdal is barred for use with for epileptics because they lower seizure thresholds.[13] In November 2002, her TD symptoms improved after the parents insisted psychotropic drugs be stopped.

On February 4, 2003, sixteen months after removal, the probate court granted temporary conservatorship to the State and appointed public defender Malorie Street to represent Nancy. Street blocked Nancy's right to a jury, objected to Nancy's appearance in court, insisted that Nancy remain in the same RCF, argued the State needed to conserve Nancy to obtain her medical records and then used this power to deny the parents' discovery rights based on Nancy's privacy, but at SARC's request (AER-N, J, K), she argued for the use of (brain injuring) Risperdal, asserting dubious benefits, *see Cl[illegible]onik declaration* (AER-N1-N6). She obtained orders restricting Nancy to Santa Clara County and SARC jurisdiction, that her parents could not take her to a doctor, and blocked her right to sue the State for injuries. Street also later blocked the appeal of the conservatorship orders by opposing the settled statement or transcripts of the record.

On February 19, 2003, Nancy was rushed unconscious to San Jose Medical Center, with uncontrolled seizures, vomiting blood and quarter inch pieces of her esophageal lining, and once again on March 2, 2003, without notifying the parents until months later.

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6 U.C. Davis L.Rev. 40, 53); also citing 60 Cal.L.Rev. 438, 510.

[13] Dr. John Friedberg, a leading neurologist consulted by the parents, called these dopamine inhibiting medications "chemical lobotomy", and "brain poison" and told them to get her off these drugs immediately. Dr. Cerezo confirmed this view in trial (AER-S16,S17).

Testimony showed that the seizures were caused by the illegal drugging on Zyprexa that Street told the probate court was necessary.[14] MediCal records (AER-J1-J5), disclosed just before trial in October, showed that Nancy had been charged for an ER visit on March 2, 2003 for an unreported skull fracture and broken femur while the parents were blocked from seeing her for four months.

C. Conservatorship Trial: Parents v. State

Trial in Santa Clara County Superior Court probate division, Hon. William F. Martin presiding, began on September 29, 2003, almost two years after removal, while her parents were unable to visit. The parents lacked counsel, having exhausted their retirement savings. It ended October 15, 2003 with DDS as conservator, over the parents' petition, violating Cal. Hlth. & S. C. §416.23[15] (App. a-48). The parents' argument for their parental preference under Cal. Prob. Code §1812 (App. a-49) was ignored. When the parents raised underlying constitutional claims, Martin refused to hear them.

When Nancy appeared, on her 33rd birthday, she displayed such affection for her parents (RT-10/3/03, p33, line 28) and they for her that the state conceded there had *never been any question* about the love and devotion the parents and daughter shared. Martin posed the issue as solely, who would make a better conservator? The record shows that Martin presumed that the state was more capable.

Eleven witnesses gave testimony for the parents, many expressing their admiration for the family (AER-M1), *see also* (RT-10/7/03, pp 106-109, 124-125 (Dr. Kaplan)). The parents' medical experts showed a pattern of concealment and neglect, including a broken collarbone, dislocated shoulder, skull fracture (AER-L1) and abuse in state care, dental neglect, injury from improper drugging (AER-G1).

The four state witnesses' testimony broke down under cross-examination (AER-S8-S10, S24-S30); *see also* (RT-10/2/03, pp 146, 149), (RT-10/1/03 p111). The probate court substantially limited the parents' presentation of evidence and testimony. SARC's staff psychologist Ms. Mulhoe testified Nancy would benefit from a limited conservatorship because it "*facilitated socialization with her peers,*"

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[14] SARC withheld Nancy's Feb-March 2003 hospitalization. In May, subpoenaed records surfaced confirming that Nancy had a nearly ruptured esophageal condition caused by Zyprexa lowering her seizure threshold (AER-T15-T19, S19).

[15] Cal. Hlth. & S. C. §416.23: "*This article does not authorize the care, treatment, or supervision or any control over any developmentally disabled person without the written consent of his parent or guardian or conservator*" (App. a-48).

ignoring Title II of the ADA's integration mandate,[16] (App. a-45). The parents' unique understanding from lifelong observations were that Nancy hated segregation with only DD persons as company.

The record belies Martin's claim of applying a "clear and convincing" standard. Importantly, he did not recognize the fundamental rights of care and companionship between parents and their children. His principal findings relied entirely on now-excludable testimentary evidence by the new rule of *Crawford v. Washington*, 541 U.S. 36 (2004). Martin's one serious claim of abuse centered on "finding" that the parents had inaccurately administered anti-seizure medication for Nancy, that parents' medical experts refuted.

The parents filed Cal. C. Civ. Proc. §§656 (App. a-46, new trial), 634 (App. a-46, trial court findings stayed), and 663 (App. a-46, correcting opinion). Judge Martin denied motions for rehearing, and overrode normal stay of judgment operating during the pendency of an appeal except for extraordinary circumstances on January 13, 2004.[17] In December 2003, the parents filed an appeal from the conservatorship orders in the State Court of Appeals for the Sixth District, case No. H026861. The parents were granted *in forma pauperis*. Motions for transcripts or settled statements were filed with the state trial court[18] and Court of Appeals, invoking this Court's *M.L.B. v S.L.J.*, 519 U.S. 102 (1996) (*Mississippi could not withhold transcript mother needed to gain review of sufficiency of evidence to support termination*). A motion for transcripts was also filed in superior court. All were denied, giving no opportunity to appeal the findings on the basis of the record.[19] The denials gave rise to a preceding Petition for Certiorari in this Court (Docket No. 04-826) from a denial of review from the State Supreme Court (S124153).

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[16] Title II of the ADA, 42 U.S.C. §12132, "in the setting that is least restrictive of the person's personal liberty"; ..."*most integrated setting appropriate to the needs of qualified individuals with disabilities.*" 28 C.F.R. §35.130(d). The preamble to the United States Attorney General's ADA Title II regulations defines that language to mean "*to interact with non-disabled persons to the fullest extent possible.*' " 28 C.F.R. Pt. 35, App. A, p. 450 (1998).

[17] *Gold v. Superior Court*, 90 Cal.Rptr.161 (1970) (*barring* Cal. Prob. C. §1310(b) execution of conservatorship pending appeal, except in extreme cases) (AER--T2-T8).

[18] The parents analogized *Conservatorship of Roulet*, 23 Cal.3d 219 (1979) contending Nancy should have the same rights as a criminal defendant to a free transcript on appeal as both face a loss of liberty. This right to transcripts for AIP's was affirmed in California by *Waltz v. Zumwalt*, 167 Cal.App.3d 835 (4th Dist. 1985).

[19] The parents recovered from their losses from litigation and purchased 1/3 of the transcripts whereupon on December 2, 2004, the state appeals court dismissed. The state appeals trial court never reached a briefing.

D. Ongoing Conservatorship Abuse

Since November 15, 2001, Nancy has never been allowed to return home or see her parents without supervision. Under SARC's continuing care and control, Nancy suffered TD, has seizures, and is still assumedly under the care and supervision of SARC general practitioner Masada, who improperly resumed Zyprexa. Her drugging has caused her edema, circulatory and possible heart failure. Where she once was able to run and hike (AER-J2), she is now suffering from muscle rigidity and contractures. Her parents are prohibited from taking her for medical care. She is not able to understand why her parents are seemingly indifferent to her plight. SARC has barred the parents at birthdays, Christmas, Thanksgiving, Easter, Halloween, and family outings. Visits have been terminated for many months at SARC's whim. SARC limits parents to one two hours per month visit at Nancy's RCF. The parents have not seen their daughter without supervision for four years.

REASONS FOR GRANTING THE PETITION

Petition for a writ of certiorari should be granted because:

Ninth Circuit's memorandum of dismissal (App. a-2) misstated very nature of case pleaded, ignoring (AOB[20] at 47-54), application of this Court's intervening *Exxon*,[21] applied simultaneously to *Smith v. Riverside County* (App. a-39). Current federal-state jurisdiction exists to reverse District Court's Rooker[22]-Feldman[23] grounds for dismissal (App. a-13). The courts below perpetuate the pre-*Exxon* interpretations of *Rooker-Feldman* conflicting with the recent holdings of this Court, requiring the intervention of this Court in its supervisory authority to ensure uniformity in the circuits.

Younger abstention doctrine cited by the courts below (App. a-4, a-16) is now mooted. Because state appeals have been dismissed without briefing despite diligence, and post-appointment review is merely threatened, not "ongoing", it does not apply when state jurisdiction is of a fundamentally different nature, especially in light of *Exxon's* new narrowing of the ground on which preclusion based interference with "ongoing" parallel proceeding stands. Circuits have grappled with conflicting applications of *Younger*, and the Ninth Circuit's memorandum raises an important question of federal law

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[20] AOB=Appellants' Opening Brief, 04-15900, 9th Cir., Dec. 6, 2004.

[21] *Exxon Mobil Corp. v. Saudi Basic Industries*, Corp., 125 S. Ct., 1517 (Mar. 30, 2005).

[22] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

[23] *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

regarding *Younger* abstention, "Our Federalism", and comity in parallel state proceedings that should be settled by this Court in light of *Exxon*.

The District Court, on a 12(b)(6) motion, without leave to amend or notice of deficiencies, dismissed parents' twelve counts invoking federal constitutional wrongs, by denying standing to represent their adult DD daughter as *next friends* despite *Whitmore*[3] standing, or as *guardians ad litem*. The District Court erroneously granted judicial notice of extrinsic facts disputed in the state court proceeding presented by defendants, rather than reading the complaint's allegations as true and in a light most favorable to the plaintiffs, "so far depart[ing] from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power".

This holding denying parental standing *prospectively confers de facto absolute immunity* to state actors for constitutional harms inflicted on the conserved adult child and her parents, without immunity inquiry, denying Fifth and Fourteenth Amendment due process. From the Ninth Circuit memorandum, no party except the state itself has standing to vindicate constitutional violations by state actors to petitioning parents and child, even those harms inflicted for two years antecedent to conservatorship. Violations of Fourth Amendment rights of freedom from unreasonable personal seizure of daughter without probable cause or warrant by defendants, antecedent to appointment of state conservatorship, may not be vindicated unless standing to represent conservatee is granted to other interested parties. Leaving unsettled rights under Rule 17(c), subject to inconsistent interpretations in the circuits where a personal representative is named as a defendant, inviting review by this Court to settle the conflicts.

Parents and daughter both are being denied fundamental First Amendment liberty interest in the continuing care and familial association with their adult non-dangerous mentally handicapped daughter, with whom they share a long established parent-child relationship protected by the Ninth, Tenth and Fourteenth Amendments. Parental caregiving relationship is such that the parents are "fully, or very nearly, as effective a proponent of the right as the latter."[24] Circuits and the highest courts of states are in conflict concerning the rights of care and custody and association between parents and adult children, and have not commented on adult disabled

[24] *Singleton v. Wulff*, 428 U.S. 106 (1976)

children, requiring this Court to settle these conflicts.

Rule of *Johns*,[25] cited by Ninth Circuit to deny third party standing to unrepresented non-attorney parents (now mooted[26]) without prejudice,[27] is motivated by judicial concern for frivolous abuse. This rule does not apply here, where practical perverse effect is to destroy constitutional rights of person rule was meant to protect. There is conflict with the Second Circuit, creating the potential for additional circuit conflict on an important question of federal law that has not been, but should be, settled by this Court.

Conservatorship abuse of elders and dependent adults by probate courts and private profiteering is a severe problem of national importance,[28] inflicting violations of human rights which this court should visit on constitutional grounds[29] to stem the growing tide of conflict between state conservatorship judgments and fundamental constitutional due process, especially Sixth Amendment rights. The Court's traditional restraint on this issue should be reversed in order to introduce urgently needed constitutional rights into state court procedures to prevent widespread conservatorships errors and abuses.

ARGUMENT I: THE COURT SHOULD REASSERT ITS RECENT HOLDINGS IN EXXON *FROM MISCONSTRUCTION*

After *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. ----, 125 S.Ct. 1517 (2005)[21] was handed down by this Court, the court below on June 22, 2005 affirmed (App. a-2) the District Court's March 25, 2004 pre-*Exxon*[21] dismissal on defendants' Fed. R. Civ. P. Rule 12(b)(6) motions in part on *Rooker*[22]-*Feldman*[23] abstention grounds (App. a-13), without reviewing it in light of the intervening *Exxon* clarification, or even citing *Exxon*. In simultaneously decided cases, the court below applied *Exxon*. The Court of Appeals endorsed the District Court ruling by misapprehending that the *Rooker-Feldman* doctrine could still be expanded to incorporate preclusion law (App. a-13).

A. Original Complaint and Denial of Amendment

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[25] *Johns v. County of San Diego*, 114 F.3d 874 (9thCir. 1997)

[26] With the parents engagement of counsel the demand is mooted here.

[27] Here, courts below here failed to follow Johns' reversible error requiring dismissal without prejudice, or granting leave to find attorney.

28 Los Angeles Times, "Guardianship for Profit", four part investigative series, by Robin Fields, Evelyn Larrubia and Jack Leonard, November 14-16, 2005; "Plan for Guardians Outlined", Los Angeles Times, December 13, 2005

[29] 5 Elder L.J. 75, "The Elderly in Guardianship: A Crisis of Constitutional Proportions", by Mark D. Andrews, Elder Law Journal, Spring 1997

The parents complaint hardly failed to state a federal case on which relief could be granted under Rule 12(b)(6). *Pro se* petitioners filed a Section 1983 Original Complaint on October 23, 2003 with twelve independent claims that properly invoked parallel federal jurisdiction and did *not* invite the federal court to overturn the unfavorable state court judgment. Only on page 67 of the 69-page complaint, under Section XXVI "Equitable, Injunctive and Declaratory Relief' did they seek relief that *would* overturn the judgment by releasing Nancy from state control.

After further study of federal practice, Mr. Golin filed an associated Petition for Habeas Corpus on December 29, 2003. He sought to shift the improper Section XXVI relief barred by *Rooker-Feldman* over to the concurrent Habeas petition (*infra* 13) and requested to amend his Section 1983 Original Complaint to remove the claim.[30]

On March 25, 2004, the District Court granted defendants' motions to dismiss on Fed. R. Civ. P. 12(b)(6), in part on *Rooker-Feldman* grounds, focusing primarily on the deficient page 67 of the complaint, without notice of deficiencies or leave to amend. As pointed out in parents' Opening Brief (AOB at 33), "Considering policy of liberality behind Rule 15, a court which fails to even consider motion to amend, much less grant it, has abused its discretion" *Marks v Shell Oil Co.*, 830 F2d 68 (1987, CA6 Mich). See also Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir.1980) (*Per Curiam*).

B. Parents' and Nancy's Injuries Unrelated to Judgment

The parents' Section 1983 complaint describes injuries that occurred in three distinct periods. Harms that occurred *antecedent to* the conservatorship trial, during trial, and post trial. Antecedent harms included: unlawful search, personal seizure, wrongful imprisonment, violations of rights of familial association, forging of signatures, slander, infliction of emotional distress, conspiracy and malicious prosecution. All occurred during the period of *almost two years after Nancy's removal on November 15, 2001,* before trial began on September 29, 2003. For example, wrongful imprisonment: from removal to October 2002, a period of more than ten months, no state actor had legal authority for custody. The conservatorship judgment could not possibly absolve defendants from culpability for injuries, liabilities and constitutional wrongs inflicted on the Golins

[30] *See "Plaintiff's Brief in Opposition to Defendant County of Santa Clara's Motion to Dismiss"* filed in District Court February 9, 2004, *at p36, "Request for Leave to Amend"*. Hereinafter=POD 2/9/04.

before the state court proceedings.

The alleged interim harms (during trial) also were not caused by nor were they appealable from the conservatorship judgment. For example: assigned counsel Street failed to represent Nancy's interests. She cooperated in the state's purpose of assuming permanent control, thus aiding in the commitment of her client in the most restrictive environment, virtually insuring her lifetime incarceration.

The post trial injuries also contain no causality. The state judgment did not instruct the state to continue to act recklessly or negligently. Nancy's pre, interim, and post trial injuries occurred not as *a result of* the state court judgment but resulted from the state's wrongful actions while Nancy was subject to state care and control.

C. Failure to Apply Exxon

The Court of Appeals' June 22, 2005 memorandum (App. a-3) stated "[the District Court considered] the legal doctrines that restrain a federal court from acting in such circumstances, including the *Rooker-Feldman*... abstention doctrine[.]" The Memorandum makes no mention of *Exxon*.[21] This upheld a line of legal analysis rejected by the unanimous U.S. Supreme Court when it overruled *Exxon I*. This Court held that the jurisdictional *Rooker-Feldman* doctrine is not preclusion-based and rejected the application of *Rooker-Feldman* to bar adjudication of federal court claims because identical claims were brought in state court.

> *It is now a settled precedent of this Court that the Rooker-Feldman doctrine does not apply where the federal plaintiff asserts "some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party." Exxon, at 1527, quoting* GASH Associates v. Village of Rosemont, Ill., *995 F.2d 726, 728 (7th Cir. 1993). (Emphasis added).*
>
> *"[N]either Rooker nor Feldman supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment* on the same or related question *while the case remains* sub judice *in a federal court." Ibid. (Emphasis added).*
>
> *"Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law", i.e., the Full Faith and Credit Act, 28 U.S.C. §1738. It is now settled precedent that "federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court." Ibid. "Rooker - Feldman is not triggered simply by the entry of judgment in state court. Id., at 1526.*

The Ninth Circuit (App. a-2) construed the case as a *state court*

conservatorship challenge (App. a-8) fastening solely on the offending one appended section (which the parents sought to remove) and discounting the twelve primary claims (see AOB at 47-54). The parents emphasized this error in their Court of Appeals Opening Brief:

> *"As we stated in our Brief in Opposition to Ms. Street's Motion to Dismiss (Docket #47, 3/10/04, p2): 'At the risk of repeating this one critical point to remind the Court to please not be confused by the defendants misleading repetition here; that is emphatically NOT a conservatorship appeal.'" (emph. orig.)*

***D. Comparison of* Smith *and* Golin**

On the same day, the same panel applied *Exxon* to reverse the District Court's dismissal of a similarly situated case *Smith v. Riverside County*, 2005 WL 1473958 (9th Cir., 2005) (App. a-39) (unpublished) *inter alia* on *Rooker-Feldman* grounds. This found in favor of Smith on First, Fourth and Fourteenth Amendment grounds, (a minor child was removed from her family by state agents without warrant, exigent circumstances or probable cause). "[B]ecause [Smith's] complaint does not allege that the state court judgment was erroneous" (App. a-40). The post-*Exxon* Ninth Circuit reversed other cases in light of *Exxon*. *See Kougasian v. TMSL, Inc.*, 359 F.3d 1136 (9th Cir.2004); *Maldonado v. Harris*, 370 F.3d 945 (9th Cir. 2004); *Wolfe v. Strankman*, 392 F.3d 358 (9th Cir.2004).

Like *Smith*, our Original Complaint implicates the First, Fourth, and Fourteenth amendments.

E. Four Pronged Rooker-Feldman in Light of Exxon

Application of a properly stated *Rooker-Feldman* abstention in light of *Exxon* would involve four tests:

> *"From this holding, we can see that there are four requirements for the application of Rooker-Feldman. First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must "complain of injuries caused by [a] state-court judgment[.]" Third, the plaintiff must "invit[e] district court review and rejection of [that] judgment." Fourth, the state-court judgment must have been "rendered before the district court proceedings commenced"--i.e., Rooker-Feldman has no application to federal-court suits proceeding in parallel with ongoing state-court litigation."* Hoblock v Albany Cty. Board of Elections, *422 F.3d 77 (Sep 02, 2005, 2nd Cir).*

Prongs one and four are not reached, since the appeal of the probate court judgment was ongoing. Prong three would be mooted upon granting the proposed amendment removing the offending equitable relief (Original Complaint, Section XXVI) which required

overturning the state court conservatorship judgment (*infra* 13).

Regarding prong four, the test of *Rooker-Feldman* in the light of Exxon is: when did the state court judgment end and when did the federal case begin? The only relevant consideration, this Court stated, is whether the state judgment precedes a federal judgment on the same claims.

> *"...state proceedings have "ended" when: (1) the highest state court in which review is available has affirmed the judgment below and nothing is left to be resolved; (2) the state action has reached a point where neither party seeks further action; and (3) state court proceedings have finally resolved all the federal questions in the litigation, and only state law or purely factual questions remain to be litigated",* Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico, *410 F.3d 17, 177 L.R.R.M. (BNA) 2399, 151 Lab.Cas. P 10,488 (1st Cir., May 27, 2005).*

When the District Court dismissal occurred, the state conservatorship appeal was pending and was never permitted to be examined for error by a full round of appellate review, because the state itself erected an impenetrable barrier to appeal, and post-trial remedies were unreasonably denied.

Prong three also fails because the parents complained of injuries not *caused by* the state court judgments but in most instances *antecedent to it* (AOB at 52-53). The probate court cannot hold civil trials for damages and awards for tort injuries and violations of constitutional rights. Probate court had only two questions at the start of proceedings: i) whether Nancy needed a conservator, and ii) who should be the conservator, family or state?

A "probate exception" to federal jurisdiction does not exist here. On March 14, 2004, the parents cited *Markham v. Allen*, 326 U.S. 490 (1946) (*"the probate limitation prohibits a federal court only from probating a will or administering an estate"*).[31] A search of "probate exception" cases uncovered none that considered a disputed conservatorship of the person as falling within the exception.

Contrary to District Court's misstatement (App. a-17), the "domestic relations exception" does not reach beyond intrafamily minor child custody matters to include unlawful restraints of fundamental liberty interests and the denial of civil rights involving *disabled adult children. Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (do-

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[31] See, 39 Fed. B. News & J. 579, *"Federal Probate Jurisdiction-Examining the Exception To The Rule"*, Federal Bar News and Journal, November/December, 1992, Gregory C. Luke and Daniel J. Hoffheimer.

mestic relations exception was narrowly constrained to areas concerning "divorce, alimony and [minor] child custody disputes"). Parents who seek to protect their adult disabled child, by asserting a liberty interest in companionship and care and control cannot be barred from federal courts simply because their claims relate to their "domestic relations."

F. Feldman Permits General Challenges to Procedures

In *Feldman* (460 U.S. 462, 486 (1983)) this Court held that it did not constitute prohibited appellate jurisdiction to make a general challenge to *the constitutionality of the procedures employed* in the state court proceedings. The parents challenged the state court conservatorship procedures, complaining about the state's unconstitutional use of Cal. Hlth. & S. C. §416.5 in applying for conservatorship in opposition to the family - without preferences applied - in violation of the state's own Cal. Hlth. & S. C. §416.23. The parents complained in probate to the suspension of constitutionally undergirded parental preference. They complained of the denial of due process, including right to trial *at least for* the unscheduled findings of supposed parental unfitness, not held to be the original purpose of the hearing, on which basis the jury demand was denied. The parents complained of being forced to proceed without representation, denial of discovery, denial of transcripts for appeal, and a legion of due process violations and constitutional challenges that properly *can* move forward in federal court.

G. District Courts Have Original Jurisdiction over §1983

Federal courts *are* courts of original jurisdiction over parallel Section 1983, 1985 proceedings in vindication of constitutional rights violations expressly granted by Congress under 28 U.S.C. §1343 (App. a-44), which have never required state remedies first be exhausted, and thus are not ordinarily barred by abstention claims or comity under *Rooker-Feldman*,[32] see *Monroe v. Pape*, 365 U.S. 167 (1961), *Mitchum v. Foster*, 407 U.S. 225 (1972).

ARGUMENT II: THE COURT SHOULD RECOGNIZE A FUNDAMENTAL FAMILIAL LIBERTY INTEREST IN CARE AND COMPANIONSHIP WITH ADULT DISABLED CHILDREN

The Court of Appeals' affirmation invokes an important question of federal law, which is ripe for settling conflicts between circuit

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[32] See 42 Buffalo L. Rev. 501, "*Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*", Bryce M. Baird, Spring 1994.

courts and state highest courts; over the scope of parental rights to care, association, and companionship with adult children or more particularly with adult disabled children. *Petitioners invoke the First Amendment, supported by the Fourteenth and the Fourth Amendments, underscored by the Ninth Amendment establishing unenumerated rights, to support this claim.*

Our traditions and respect for family dictate that the parents and Nancy deserve the full range of familial protections.[33] No matter what Nancy's chronological age, her relationship to her parents is that of a minor child, who has never ceased to rely on them for care and control and who resided with them in the parents' home essentially since birth - under very difficult circumstances and at great sacrifice (and reward). The trial court conceded a close and loving relationship between Nancy and her parents. SARC admits that Nancy "derives great joy" from her parents companionship. Yet, the trial court chose to severely limit her freedoms, while conceding that Nancy is neither gravely disabled nor a threat to herself or others. The court imposed a limited conservatorship of unwarranted severity, in contradiction of her fundamental rights and statutory authority intended to "maximize independence and freedom of choice" and serve families (Cal. Welf. & Inst. C. §4620.1).

Petitioners contend they and their daughter are being denied a fundamental, natural and traditional right to parental care and familial association, partially based on a common law right to consortium. As the Court recognized,[34] protection of families from unwar-

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[33] See, 57 Vand. L. Rev. 1883, 1923: *Growing pains: The Scope of Substantive Due Process Rights of Parents of Adult Children*, by Isaac J. K. Adams, in Vanderbilt Law Review, October, 2004; "The scope of the parental liberty is determined solely by whether a child has reached adulthood in the constitutional sense. Even though a child may reach the state-defined age of majority, the full constellation of the parental liberty interest may remain intact if the child remains peculiarly vulnerable and/or unable to make informed, mature decisions. *A clear example would be the case of a mentally retarded child. Though the child may be older than eighteen years of age, her parents would still retain the full scope of their parental liberty interest if they so desired. In such a case, the parental liberty interest in companionship would extend to a child who is statutorily defined as an adult* (emph added). See also 40-MAR Trial 12, *Courts grapple with Constitutional Claims for Loss of Adult Children*, by Carmen Sileo, March 2004:

[34] *Meyer v. Nebraska, 262 U.S. 390, 399 (1923), Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Stanley v. Illinois*, 405 U.S. 645 (1972), *Parham v. JR*, 442 U.S. 584 (1979), *Lassiter v. Dept. of Social Services*, 453 U.S. 927, 102 S. Ct. 889 (1981), *Santosky v. Kramer*, 455 U.S. 745 (1982), *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), *Troxel v. Granville*, 530 U.S. 57 (2000).

ranted state interference can be found partly in the First and partly in the Ninth Amendment,[35] as a substantive due process right protected by common law and the Fourteenth Amendment.

The District Court opined, "There is nothing on this record to support the Golins' contentions that the state-appointed conservator is an inadequate legal representative to warrant the appointment of a next friend or *guardian ad litem*." (App. a-11). And: "[In urging that independent counsel be appointed], the parents proffer little aside from their own disagreement with the probate court's appointment of Mr. Allenby as conservator. There is nothing to suggest Mr. Allenby (or his attorney) has failed to look out for Nancy's best interests." (App. a-12)

This statement fails to give sufficient weight to the parents' and their adult daughter's deeply rooted fundamental liberty interest in preserving family relations. And underscores the failure of both the state and federal court proceedings to recognize the family custodial and companionship interests.

A. Conflict over Familial Rights and Adult Children

It is well established that a parent has a "fundamental liberty interest" in "the companionship and society of his or her child" and that "[t]he state's interference with that liberty interest without due process of law is remediable under [42 U.S.C. §]1983." *Kelson v. City of Springfield*, 767 F.2d 651, 654-55 (9th Cir.1985) (citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). Moreover, "*the First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'*" *Board of Dir. v. Rotary Club*, 481 U.S. 537, 545 (1987) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)); see also *Conti v. City of Fremont*, 919 F.2d 1385, 1388-89 (9th Cir.1990).

While the familial liberty interests of parents and children conjures images of *minor children*, the circuit courts have struggled with *adult children* and have not addressed *adult children who have never been competent*.[33] The Seventh and Ninth Circuits accept a parental liberty interest, albeit distinguishable, whereas the First, District of Columbia, and Third Circuits have denied the underlying right.[37] Only the Seventh Circuit has read Supreme Court precedent

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[35] *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965)

as providing that a parental right to the companionship, care, custody and control of a child does not cease once the child reaches some defined age of adulthood.[36]

> *"The Bell court found the time at which the parent-child relationship loses constitutional protection to be dependent on various factors....[T]he Bell decision suggests that an examination of the nature of the parent-child relationship is also necessary in determining whether a parent has a cause of action under section 1983 for the deprivation of the parent-child relationship,* (57 Vand. L. Rev. 1883, 1907)[33]

The Highest State Courts are also divided on the question of whether parents are entitled to damages for loss of a child's consortium due to death, injury, or intentional interference with the parent-child relationship only to minority or whether it extends beyond minority, and some states are internally divided within their districts on a case-by-case basis.[37]

After four years, the parents are still forced to submit to burdensome supervised visitation without access to Nancy's living quarters inside a group home 90 miles from her parents.[38] For the parents and especially for childlike Nancy, this constitutes "cruel and unusual punishment" under the Eighth Amendment. Every time the parents must leave Nancy, the incomprehensible withdrawal further weakens her parent-child relationship. The restrictions on visitation serves no reasonable state interest, denying state efforts at family reunification, and appear motivated solely by reprisal against the parents for their opposition.

B. Right of Privacy Protects Person not State

The State further interfered with parent and child by appointing attorney defendant for Nancy. Street used the privacy rights of Nancy", persuading the courts below by averring that the Federal HIPAA codes prevented her from releasing records,[39] to defeat all

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[36] *Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-53 (7th Cir. 1984); *Mattis v. Schnarr*, 502 F. 2d 588, 590, 593-95 (8th Cir. 1973).

[37] For annotated breakdown of complex State conflicts see: 54 A.L.R.4th 112, American Law Reports, *"Parents' Right to Recover for Loss of Consortium in Connection with Injury to Child"*, Todd R. Smyth, J.D. (2005).

[38] This imposition was not court ordered or statutorily authorized, but imposed by SARC at its discretion, cf Johnson letter to probate (App. a-35).

[39] HIPAA civil rights legislation intended to protect the privacy of medical records is embodied in Title 45, Subtitle A, Part 164 (2004), of the Code of Federal Regulations (cited as 45 C.F.R. §164). But 45 C.F.R. §164.512(e) (App. a-45) provides for releases of records for subpoenas and court orders, and 45 C.F.R. §164.502 (App. a-45)

(cont'd next page)

motions for discovery which might reveal abuse of her client. Nancy cannot speak or understand such issues and no independent psychological evaluation of the family has been conducted, how did Street divine Nancy's wish not to tell the court of her privations?

Courts have typically applied the right of privacy first to the protected zone of the *family (Griswold v. Connecticut*, 381 U.S. 479, 492 (1965)), *not to state custodial actions.* The parents were minutely examined, but records which described Nancy's injuries were and the state injurious custodial actions were left ignored. This Court has never upheld this "statist notion" (*Parham v. JR*, 442 U.S. 584, 603 (1979)) except in the most exigent circumstances.[40]

C. Denial of Standing Rests on Disputed Extrinsic Findings.

The District Court's dismissal declared the parents lacked standing as next friends to represent their adult dependent daughter (App. a-12). The parents petitioned for next friend standing (or alternatively *guardian ad litem* status) in District Court, and cited the three prong test of *Whitmore v. Arkansas*, 495 U.S.149, 163-4 (1990): [(1) explain why 3rd party cannot proceed himself, (2) next friend truly devoted to 3rd party's interests, (3) significant relationship] for authority in their Opening Brief in the court below (AOB at 39). As devoted parents, they certainly withstood each of its criteria. The District Court in a 12(b)(6) proceeding adopted the extrinsic disputed findings in the state court opinion below, in order to show the parents lacked next friend qualification.[41] The defendants requested judicial notice of the erroneous findings of the state trial court. While these disputed "facts" were part of the trial court's reasons for preventing the parents from appointment as conservators, these disputed findings should not necessarily bar their qualifications as next friends or *guardians ad litem.*

The Court of Appeals declared that:

"...the district court went to the merits of the guardian ad litem issue. It considered the detailed factual findings of the state court...

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provides for releases for such persons as whistleblowers or advocates.

[40] *"..the statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition"* (*Parham*, at 603).

[41] The District court attempted to defend this abuse of discretion in a footnote (App. a-4, footnote 1), admitting to what is in fact clear error by the analysis of controlling *Lee v. City of Los Angeles*, 250 F.3d 668, 688-691 (9th Cir., 2001). The facts *were* challenged on pending appeal, and failed the tests for preclusive collateral estoppel (*infra*, 23).

The district court did not abuse its discretion when it declined to appoint the Golins as Nancy Golin's guardians ad litem" (App. a-4)". This District Court dismissal departs radically from established judicial procedures. *"Consider[ing] the detailed factual findings in state court"* on a 12(b)(6) motion is clearly improper and an abuse of discretion by 9th Circuit's own holdings, as analyzed in *Lee v. City of Los Angeles*, 250 F.3d 668, 688-691 (9th Cir., 2001):

> *"on a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'* Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., *181 F.3d 410, 426-27 (3rd Cir.1999)"...(Id. at 688)... [It] may not take judicial notice of a fact that is "subject to reasonable dispute." Fed.R.Evid. 201(b)"....(Id at 689)*

The district court incorrectly took judicial notice the state court's disputed findings for the truth of the matter, not for fact that the findings existed. These findings were challenged in post-trial proceedings just two months before and were yet on appeal and not final in state court. Petitioners stayed these findings by a post-trial motion under Cal. Code of Civ. Proc. §663 (App. a-46) in November 2003. These matters were never resolved.

As the Court of Appeals acknowledged, the District Court improperly *"went to the merits of the state court findings"* (App. a-4, a-7). This is the clear error, reaching the merits without accepting jurisdiction. In fact, the District Court relied solely on the validity of the state court's erroneous findings in dismissing plaintiffs' §1983 claims for standing at the pleading stage.

> *"When the legal sufficiency of a complaint's allegations is tested by a motion under Rule 12(b)(6), "[r]eview is limited to the complaint."* Cervantes v. City of San Diego, *5 F.3d 1273, 1274 (9th Cir.1993). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs."* [42] *Indeed, factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6)... In granting defendants' motions, the court assumed the existence of facts that favor defendants based on evidence outside plaintiffs' pleadings, took judicial notice of the truth of disputed factual matters, and did not construe plaintiffs' allegations in the light most favor-*

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[42] *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.1996).

able to plaintiffs" (Id. at 688).

D. State Findings Are Not Issue Preclusive

'Only a final judgment that is 'sufficiently firm' can be issue preclusive.' *Luben Indus. v. U.S.*, 707 F.2d 1037, 1040 (9th Cir. 1983). To ascertain 'firmness' courts look to various factors, including whether the decision was tentative, the parties were fully heard, the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or was actually reviewed on appeal. *Luben*, at 1040 (quoting *Restatement(2d) of Judgments* S 13 cmt. g (1982)).[43] *Luben* affirmed the infirmity of a district court's determination regarding an interlocutory order issued by another judge in the same district. Id

In *Brokaw v. Weaver*, 305 F.3d 660 (7th Cir., 2002), an adult foster child A.D. Broka having reached the age of majority sued county officials under §1983 for fraudulently removing her from her home when she was 3-years-old by trumping up false child abuse charges against her parents. The district court held that "A.D.'s suit was barred by the *Rooker-Feldman* doctrine because, in effect, A.D. was challenging the validity of the state removal proceedings." A.D. appealed. The Seventh Circuit reversed because, "[n]otwithstanding the doctrine of collateral estoppel, redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation".

In the parents' reply brief (submitted timely but refused admittance by the Court of Appeals) they argued insufficiency, citing *Restatement (2nd) of Judgments*, supra at some length (ARB at 22-25) and attested to numerous factors dispositive of insufficiency.

***E. Courts Below Misstated Cases and Statutes Denying Guardian Ad Litem* Standing**

The Court of Appeals misstated completely the requirements of the forum state (App. a-4) thus denying Nancy 1st Amendment access to the courts, by limiting standing the State.

"See Fed. R. Civ. P. 17(b) (requiring that capacity of an individual to sue be determined by the law of that individual's domicile); §372(a) (requiring that a party for whom a conservator has been appointed be represented by that conservator)."

The District Court also cited Cal. C. Civ. Proc. §372(a) (App. a-

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[43] Rest. 2nd Judgments §28 (2002), Topic 2. Personal Judgments, Title E. Issue Preclusion, Chapter 3. Former Adjudication: The Effects Of A Judicial Judgment, §28. *Exceptions To The General Rule Of Issue Preclusion*, American Law Institute, current through Sept. 2004.

10). However, Cal. C. Civ. Proc.§372(a) also allows for an incompetent to be represented by a *guardian ad litem*. (App. a-46):

Cal. C. Civ. Proc. §372(a): ... that person shall appear either by a guardian or conservator of the estate ***or by a guardian ad litem*** *appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case..." (emph. added).*

In fact, if Nancy Golin's *own parents* do not qualify for *Whitmore* next friend standing, who does? According to the District Court, "*It would thus appear that respondent [DDS], if anyone, would have standing to challenge Nancy's custody*" (App. a-32). How could the state challenge its own custody? Nancy's is similarly situated to the adult incompetent plaintiff in *O'Connor v. Donaldson*, 422 U.S. 563 (1975).[44] But without a representative willing to defend her right to liberty, her liberty interests exist only in the air. The District Court cited *United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, State of Wash.*, 795 F.2d 796, 804 (9th Cir.1986), which is exactly the situation here: "*if an incompetent person is represented, it is only where the representative refuses to act or whose interests conflict with the person represented that the incompetent may sue by next friend*" (Id. at 805) (emph. added).

This standard conflicts with Rule 17(c) which requires a court to take whatever measures it deems proper to protect an incompetent person during litigation. Instead of taking necessary steps, the District Court presumed that the interests of Nancy were *not in conflict* with her state conservator or her personal representative, in opposition to the proper reading - on a preliminary Rule 12(b)(6) motion for summary judgment - of the facts alleged in the complaint as true and in a light most favorable to the plaintiff.

There is circuit conflict regarding the appointment of a next friend when the general representative has a conflict of interest with the Plaintiff. In the Third Circuit, in *Gardner v. Gardner by Parson*, 874 F.2d 131 (3rd Cir., 1989), a next friend was appointed over the general representative because the general representative was named as a defendant in the suit. This Court in *Singleton v. Wulff*, 428 U.S. 106, 114-5 (1976) held:

If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue... the relationship between the liti-

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[44] *O'Connor v. Donaldson*, 422 U.S. 563, 573-576 (1975): "A State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends, ...".

gant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter."

F. State's Advantage Offends Doctrine of Clean Hands

Could a public guardian rob, imprison, injure, abduct, or deprive a citizen of all of her rights with absolute immunity merely by virtue of a state conservatorship appointment? This violates the common law Doctrine of Clean Hands, codified under Cal. Civ. C. §3417: "*No one can take advantage of his own wrong.*" "Known as the clean hands doctrine..., this equitable principle forms a possible defense in all actions in which the plaintiff has overstepped the bounds of acceptable conduct", (2 Cal. Affirmative Def. §45:1 (2005 ed.))

The state's exclusive standing derives in large measure from the advantage their unlawful conduct gave them in removing Nancy and continuing her wrongful imprisonment and custody without authority. Conversely, state actors with unclean hands cannot invoke federal immunity. In *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996):

"Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 or §1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution[45] insures that the proper construction may be enforced."

G. Circuit Conflict on Third Party Lack of Counsel

The courts below cited *Johns v County of San Diego*, 114 F.3d 874 (9th Cir., 1997) for the rule that the parents could not sue on behalf of their daughter because neither is an attorney (App. a-4).[26]

The attorney rule originates with the concern that non-attorney parents were bringing frivolous suits, as occurred in *Johns*, or in *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir.1990). Application here expands the rule far beyond its original concerns. At least one circuit has qualified the rule: "[T]*his rule is not as absolute as it may seem...the rule that a non-attorney may not represent her child should be applied gingerly*") *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281 (2d Cir. July 05, 2005).[46]

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[45] U.S. Constitutional Article VI (App. a-41)

[46] The *Tindall* Court reasoned: "Although the rule stems largely from our desire to protect the interests of minors, ...we think it may, in some instances, undermine a child's interest .... Indeed... it may force minors out of court altogether...not allowing guardians to do so – if they are regarded by the court as reasonably competent in this regard – may thus result, in some instances, in unredressed violations of chil-

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But *Johns* indicates that *pro se* petitioners should be granted additional time to obtain an attorney (but the Circuit Court chose not to follow) or at least dismissed *without prejudice*.

ARGUMENT III: THE COURT SHOULD REJECT OVERBROAD EXPANSION OF YOUNGER DOCTRINE IN LIGHT OF EXXON

The Court of Appeals reviewed *de novo* the District Court's dismissal (App. a-4). Yet the Ninth Circuit's opinion simply deferred to the District Courts reasoning, referring to *Younger* (App. a-16).

A. Younger's Three Prongs

As argued in the parents' lodged reply brief (ARB at 12-14), the "ongoing" prong was mooted during the pendency of the appeal by the state court of appeals' dismissal of the petitioners' appeal without reaching briefing on December 2, 2003.

The District Court cited *Guardianship of Kemp,* 43 Cal. App. 3d 758, 766 (1974), (App. a-16) (following *Browne v. Superior Court of San Francisco County,* 43 Cal.App.3d 758 (1940)), for the proposition that continuing jurisdiction over conservatorship appointments remains with the state court that appointed the conservator and cannot be reviewed by another court even on habeas.

But, a jurisdictional mandate not acted on is not an *"ongoing"* proceeding, but merely the *possibility* of an exercise of jurisdiction. In *Agriesti v. MGM Grand Hotels, Inc.,* 53 F.3d 1000 (9th Cir. 1995), [the court below] reversed a *Younger* abstention dismissal involving a criminal trespass action, "because there were no ongoing state judicial proceedings," but "only the potential for a future criminal prosecution" *Id.* at 1001. "[T]he potential for future state judicial proceedings ... does not trigger Younger abstention." *Id.* at 1002. "Younger and its progeny have used the term 'pending proceeding' to differentiate between state proceedings that have commenced from those that are merely threatened. *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975), at 607." (citing *Flangas v. State Bar of Nevada,* 655 F.2d 946 (9th Cir. 1981)) (ARB p 13).

The District Court held, "*Probate Code §1850 mandates ongoing review of conservatorship matters*" (App. a-49). However, that argument fails because, as the parents lodged reply brief reported, the probate court has not held any reviews in two years, failing to *exercise* continuing jurisdiction, granting conservatorship "for an indefinite period" (App. a-26), and "without limitation".

The annual or biennial review mandated by §1850-1851 is

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dren's rights or interests".

merely executive or administrative and not judicial in nature. It involves an investigation and report by the probate investigator who would start by asking the incompetent mute Nancy if she still wants to be conserved (underscoring that this conservatorship is intended to be voluntary and not coercive). There is no statutory mandate for a court hearing or opportunity to oppose a motion to continue.

The regional center also conducts periodic reviews preparing an annual Independent Placement Plan (IPP), but this is administrative, because SARC does not admit the parents or any outside parties, and forged Nancy's signature to it on January 4, 2001.

In *New Orleans Public Service, Inc., v. Council of the City of New Orleans,* 491 U.S. 350 (1989) this "Court determined that *Younger* did not even come into play in *NOPSI* because the state administrative proceeding at issue was not judicial in nature."[47]

Yet, the same view was recently pre-emptively denied by the 11th Circuit in *Foster Children v. Bush*, 329 F.3d 1255 (11th Cir., 2003) *cert. den'd*, 540 U.S. 984 (2003).[48] A factually analogous case in the Tenth Circuit opened the possibility of conflict on this question in the circuits (*Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253 (10th Cir. 2002), *see also Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003). The Court should revisit the *Younger* question to exercise supervisory authority and restore uniformity below.

The District Court's ruling poses a doctrinal conflict. If the Superior Court has "ongoing jurisdiction" post-appointment by virtue of Cal. Prob. C. §1850, their orders are *not* "final judgments" for *Rooker-Feldman* purposes, especially now in light of *Exxon*. But if their orders *are* final judgments, they cannot be "ongoing" for purposes of the first prong of *Younger*. Only one or none may be true[49].

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[47] 99 Nw. U. L. Rev. 1355, 1371, Northwestern University Law Review Spring 2005, *"Abstention Preemption: How the Federal Courts Have Opened the Door to the Eradication of "Our Federalism"*, citing (at fn 47) NOPSI at 369-370: "We have never extended it [Younger] to proceedings that are not 'judicial in nature.'"

[48] See *"Dismissing the Foster Children; The Eleventh Circuit's Misapplication and Improper Expansion of the Younger Abstention Doctrine in Bonnie L. v. Bush"*, by Nora Meltzer, Brooklyn Law Review, 2004-2005.

[49] Cal. Code of Civ. Proc. §577 underscores the viewpoint that conservatorship judgments are not "final": "A judgment is the final determination of the rights of the parties in an action or proceeding". The orders granting conservatorship are not judgments, because "final" judgments cannot be reversed. Conservatorships are supposedly subject to review and modification by the probate court under §1850 (assuming that court opts to retain jurisdiction. They are not "pending proceedings" either but merely "potential proceedings". "Younger abstention does, in fact, depend on the "technicality" of ongoing judicial proceedings" (*Agriesti, supra* at 1002).

Younger decides abstention for complaints seeking to enjoin state court judgments. While the parents would do anything to release their daughter from state custody, their twelve original counts do not seek enjoinment. Their federal claim escapes both *Rooker-Feldman* and *Younger* specifically because they seek neither review nor enjoinment of the state court.

The District Court relies on this misstatement that this case is a conservatorship challenge (App. a-17) in order to conclude that the parents are inviting interference with important state interests. These are two fundamentally different types of civil proceedings with differing jurisdictions and different types of available relief. Relief available in state probate court (conservatorships) is not available in the federal courts (damages awards) and vice versa.

Courts have struggled with construction over "interfering":

> *"...the adjudication of whether the state's procedure used to separate a parent from a child complies with the constitutional due process requirements is squarely within this Court's federal question jurisdiction and does not entail any investigation by the federal court into the fitness of the parent to care for the child or the issuance of any decree that the parent must necessarily be reunited with the child."* Thomas v. New York City, *814 F. Supp 1139, E.D.N.Y., (1993).*

See also *Blair v. Supreme Court of Wyoming*, 671 F.2d 389, 390 (10th Cir.1982), *Rubin v. Smith*, 817 F Suppl. 995 (1993).

The due process irregularities defeat the third *Younger* prong, because they arise from the denial of a full and fair opportunity to litigate (*infra* 8) and to appeal (*infra* 3).

B. Malicious Prosecution Not Mooted,* Dombrowski *"Bad-Faith Prosecution" Exception to* Younger *Applies.

As argued in Argument VII, there is robust factual evidence of "bad faith prosecution" (*Dombrowski v. Pfister*, 380 U.S. 479 (1965)), defeating application of *Younger* here.[50]

The courts below relied on the defendant's "facts" on the issue of probable cause for prosecution of the parents. The District Court never reached a briefing on a lack of probable cause. But the Court of Appeals declared that, *"This contention fails because they did not show lack of probable cause"* (App. a-5). The District Court merely

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[50] Three circumstances in *Dombrowski* existed which distinguish it from *Younger:* (1) a prosecution brought without the reasonable expectation of a conviction; (2) a prosecution motivated to discourage constitutionally protected activity; and (3) the prosecution threatened to bring more indictments."

heard surprise non-noticed allegations, in oral argument during the single Rule 12(b)(6) motion in the pleading stage.

The Court of Appeals was shown the evidence, contained in petitioner's briefing (AOB at 71-72) and excerpts of the record, that no probable cause existed for parental prosecution, and that after the DA knew no such probable cause existed he continued to prosecute for another 14 months – before dismissal. The record is replete with evidence of the DA's improper aiding the state in its conservatorship bid. *("DDS emphasized the DA and the TRO")* (B14-B15)[51].

In California, malicious prosecution is a legal question, left for the trier of fact or the jury.

> *"In malicious prosecution actions, when evidence bearing on question of probable cause is in conflict, it is province of jury to determine whether facts exist which will warrant inference of probable cause), and,* Fleishman v. Superior Court, *125 Cal.Rptr.2d 383 (2002); [W]here it is shown that prosecutor either knew that information was false, or had no personal knowledge of the truth, or made no investigation as to its accuracy before instituting a prosecution, there was want of probable cause)",* Centers v. Dollar Market, *99 Cal.App.2d 534 (1950).*

The DA never formally stated probable cause from the time the parents were arrested on November 29, 2001 until the day of their dismissal January 29, 2003. The warrant literally quoted the statute, Cal. Penal C. §368(c) (App. a-48). For fourteen months the DA delayed while the state had time to get appointment and then the charges were dismissed. When the parents' attorneys persisted in asking the DA for specifics, DA Randy Hey would not discuss the case until the day of dismissal when the only underlying cause that could be mustered was one frivolous count of Mrs. Golin "allowing" Nancy to wander away one time, on November 14, 2001, and this was ultimately dismissed on the DA's motion with a court stipulation that it was not to affect the conservatorship petition.

The tort of malicious prosecution requires only:

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[51] SARC and APS realized when DDS rejected their first conservatorship bid in December 2001 there was no way back. Nancy had been seriously violated and could not be released. SARC's 1/4/02 IPP admitted: *"there was infringement on her rights due to 'consumer dilemma during this period"* (AER-F2). There had to be a cover-up. DDS assisted SARC advising to enlist the local DA to prosecute the parents *for something, "emphasiz[ing] the DA"* in order to get a TRO that would stop the parents from seeking Nancy's release. Defendants used Nancy to shield themselves from liability for civil damages by conserving her and thus monopolizing her representation.

"An attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause, that is, one that any reasonable attorney would agree is totally and completely without merit. See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §452, as discussed in Zamos v. Stroud, *12 Cal.Rptr.3d 54, Cal (2004).*

The probable cause for Nancy's removal was also never shown. Cal. Welf. & Inst. C. §5150.05 (App. a-53) provides conditions for proving probable cause in a §5150 hold. By refusing to interview the parents or investigate their claims regarding their daughter's mental health history, the conditions went unfulfilled.

C. Can Present Younger *and* Exxon *Still Cohabit?*

Since this Court revisited *Rooker-Feldman* in *Exxon* and found that the doctrine does not bar federal courts from exercising "[p]roperly invoked, concurrent federal jurisdiction", the present view of *Younger* by many circuits is seen as overly broad when abstention is not preclusion based. *Exxon* newly instructs that "Our Federalism" and comity are not interfered with by independent parallel state proceedings with dissimilar jurisdictions: "*Deference of federal courts to state interests should be equally matched with state deference to federal interests*" (ARB at 21).

The *Exxon* petitioners expressed this same question in their *Question Presented*: "...divest[s] federal courts of jurisdiction solely because a pending state-court proceeding presents identical issues, **notwithstanding the long-established system of dual federal and state jurisdiction**?" (emph added). *Exxon* requires this Court to re-examine the overbreadth of current applications of *Younger*.

CONCLUSION

The Court should grant the petition for writ of certiorari, reverse the court of appeal's judgment, and order Golins' claims reinstated.

Respectfully submitted, December 14, 2005,

s/ Gerard Wallace
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Attorney for Petitioners

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APPENDIX A

OPINIONS AND ORDERS BELOW

Page	Document
a-2	August 15, 2005: Order Denying Petitioners' Petition for Rehearing En Banc, Three Judge Panel (Kleinfeld, Tajima, Thomas), Ninth Circuit Court of Appeals (Case No. 04-15900).
a-3	June 22, 2005: Memorandum of the Ninth Circuit Court of Appeals Three Judge Panel, (Kleinfeld, Tajima, Thomas), affirming dismissal in Section 1983 Civil Rights Lawsuit, (Case No. 04-15900, cited as 2005 WL 1475615 (9th Cir. (Cal.))
a-6	April 6, 2004, Orders of the District Court dismissing Plaintiffs' Complaint on Section 1983 Civil Rights Lawsuit, Northern District of California (Case No. C 03-04752 WHA).
a-20	November 10, 2003: Orders of the Superior Court of Santa Clara County probate division granting conservatorship of Nancy K. Golin enumerating six powers to be removed from her and granted to the California DDS for an indefinite period. (Case No. 1-02-PR-151096).

FILED
AUG 16 2005
CATHY CATTERSON, CLERK
US COURT OF APPEALS

ELSIE Y. GOLIN; et al., Plaintiffs-Appellants, v. CLIFF ALLENBY, Director of California Department of Developmental Services; et al., Defendants--Appellees.	No. 04-15900 D.C. No. CV-03-04752-WHA ORDER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: KLEINFELD, TASHIMA, and THOMAS, Circuit Judges

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.

FILED
JUN 22 2005
CATHY CATTERSON, CLERK
US COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Appeal from the United States District Court
For the Northern District of California
William H. Alsup, District Judge, Presiding

ELSIE Y. GOLIN; JEFFREY R. GOLIN, Plaintiffs-Appellants, and NANCY Y. GOLIN, a retarded adult, by her next friends and natural parents Jeffrey R. & Elsie Y. Golin, Plaintiff, v. CLIFF ALLENBY, Director of California Department of Developmental Services; et al., Defendants--Appellees.	No. 04-15900 D.C. No. CV-03-04752-WHA MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to by the courts of this circuit as provided by Ninth Circuit Rule 36-3

Submitted June 14, 2005***

Before: KLEINFELD, TASHIMA, and THOMAS, Circuit Judges

Jeffrey and Elsie Golin ("Golins"), parents of Nancy Golin, appeal pro se the dismissal of their 42 U.S.C. §1983 civil rights action challenging a state proceeding in which the Director of the California Department of Developmental Services was appointed Nancy Golin's permanent limited conservator. We have jurisdiction under 28 U.S.C. §1291. We review de novo questions of standing and the district court's ruling on a motion to dismiss. *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir.2000). We review for abuse of discretion the decision not to appoint a guardian ad litem. *United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, State of Wash.*, 795 F.2d 796, 804 (9th Cir.1986). We affirm.

The Golins contend that they had standing to pursue claims on behalf of Nancy Golin because she is their daughter. However, the district court properly concluded that the Golins did not have standing because Nancy Golin had previously been found incompetent and a conservator had been appointed. *See* Fed.R.Civ.P. 17(b) (requiring that capacity of an individual to sue be determined by the law of that individual's domicile); Cal. C. Civ. Proc. §372(a) (requiring that a party for whom a conservator has been appointed be represented by that conservator).

The Golins contend in the alternative that the district court abused its discretion when it did not appoint them as Nancy Golin's guardians ad litem. This contention fails because neither Jeffrey nor Elsie Golin is an attorney and non-attorneys are barred from bringing suit on behalf of others. *See Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997). Further, the district court went to the merits of the guardian ad litem issue. It considered the detailed factual findings of the state court and the legal doctrines that restrain a federal court from acting in such circumstances, including the *Rooker-Feldman* and *Younger* abstention doctrines, and the domestic-relations exception to federal jurisdiction. The district court did not abuse its discretion when it declined to appoint the Golins as Nancy Golin's guardians ad litem.

The Golins contend that the district court erred when it dis-

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*** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2)

missed their own malicious prosecution claim. This contention fails because they did not show lack of probable cause. See *Usher v. City of Los Angeles,* 828 F.2d 556 (9th Cir. 1987) (holding that in California lack of probable cause is an element of a malicious prosecution claim).

The district court did not abuse its discretion when it declined to retain supplemental jurisdiction over the state law claims. *See Ove v. Gwinn,* 264 F.3d 817, 826 (9th Cir.2001).

The Golins' remaining contentions are also without merit.

We deny the request for oral argument and deny all outstanding motions as moot.

AFFIRMED.

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FILED
APR 0 6 2004
RICHARD W. WIEKING, CLERK,
U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANCY K. GOLIN, *et al.*,

Plaintiffs,

v.

CLIFF ALLENBY,
Director of the California Department of Developmental Services, *et al.*,

Defendants.

ENTERED IN CIVIL
DOCKET 4/6/04

No. C 03-04752 WHA

ORDER DISMISSING PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

This case is the second in a series of federal collateral attacks on a state conservatorship proceeding. Pro per plaintiffs Jeffrey Golin and Elsie Golin are the parents of Nancy Golin, who is developmentally disabled and the Golins' adult biological daughter. The parents bring this civil-rights action against several state and local agencies and employees thereof (fifteen defendants in all) following a trial in the probate court that appointed defendant Cliff Allenby, director of the California Department of Developmental Services, as Nancy's permanent limited conservator. This action is brought on Nancy's behalf but also seeks remedies particular to the parents. All claims, however, are related (some to a greater extent than others) to the state-court proceeding. Various defendants either move or join in three motions to dismiss the first amended complaint. This order **DISMISSES** this case.

STATEMENT

The heart of this federal action arises out of a state conservatorship proceeding in Santa Clara County involving 33-year-old Nancy Golin. The issue in the state court was who would be appointed as Nancy's conservator. The California Department of Developmental Services, acting through the San Andreas Regional Center, a not-for-profit corporation, and Embee Manor, where Nancy currently resides, petitioned the probate court for the appointment. Plaintiffs Jeffrey and Elsie Golin filed a competing petition. Following a three-week trial (in which Mr. and Mrs. Golin represented themselves), the probate court found, based upon clear and convincing evidence, that Nancy lacked the capacity to provide for her own personal needs for physical health, food, clothing and shelter, and to manage her own financial resources. The court also concluded, again based upon clear and convincing evidence, that Nancy's parents - Mr. and Mrs. Golin - were unable to provide for Nancy's best interests. Relevant to the present motion, the court made three specific findings, each by clear and convincing evidence, specific as to the Golins. *First,* the court found "that both Mr. and Mrs. Golin are presently unable to provide for the best interests of their daughter, Nancy Golin, because of their history of continuous conflicts with most medical and other professionals" (Exhibit 1 to Santa Clara County's Request for Judicial Notice). *Second,* "a history of marital conflict between the parents rendered them unfit to serve as their daughter's conservator" *(ibid.). Third,* the court found that the Golins had a history of neglecting and abusing their daughter, rendering them unable and unfit to provide for Nancy's best interests as her conservator *(ibid.).* As a result, the court appointed Cliff Allenby, director of the Department of Developmental Services, as Nancy's permanent limited conservator. Mr. and Mrs. Golin filed a notice of appeal from the probate court's findings, which is currently pending before the California Court of Appeal for the Sixth District (Exhibit 2 to Santa Clara County's Request for Judicial Notice).[1]

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[1] On a motion to dismiss, courts may consider the complaint and documents appended to the complaint. Furthermore, courts may take judicial notice of matters of public record outside the pleadings without converting the motion to dismiss into one for summary judgment. *MGIC Idem. Corp. v. Weisan,* 803 F.2d 500, 504 (9th Cir. 1986). This order finds the materials submitted by the parties to be properly the subject of judicial notice because they contain facts not subject to reasonable dispute and "they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be ques-

(cont'd next page)

Meanwhile, the day after the state court issued its statement of decision, Mr. and Mrs. Golin filed the instant suit seeking, in essence, to reverse the order of the probate court appointing the state as Nancy's conservator and to restore Nancy to their custody. The Golins named virtually everyone who had any involvement in the proceeding below as a defendant here, beginning, for instance, with Lori Kratzer of the City of Palo Alto Police Department, who first investigated reports that the Golins had neglected and abused Nancy. Other defendants include Malorie M. Street of the Santa Clara Public Defender's Office, who was appointed to represent Nancy in the conservatorship proceeding. The Golins have also sued Edna Mantilla, the owner of Embee Manor, where Nancy and other developmentally-disabled adults reside. There are others as well, including Nancy J. Johnson whose role in this chain of events was as counsel in the conservatorship proceeding for defendant San Andreas Regional Center. Of course, the Golins have also sued Mr. Allenby, Nancy's court-appointed conservator.

The first amended complaint sets forth twelve separate causes of action.[2] Each claim is set forth below with the following reservations. The pleading does not specify which claims apply to which defendants. Neither does the pleading indicate whether the claims asserted therein seek relief for alleged wrongs done to Nancy, the parents, or both, although it appears that most of the claims are brought completely on Nancy's behalf. The complaint raises both federal and state claims[3]. Mr. and Mrs. Golin first assert a claim under 42 U.S.C. §1983. Their position is that Nancy was conserved in viola-

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tioned." Fed. R. Evid. 201(b)(2).

[2] Mr. and Mrs. Golin commenced this action on October 22, 2003, by filing an extensive complaint covering 69 pages. However, at the initial case management conference various defendants noted that the "complaint" filed with the Court was not consistent with the "complaint" served upon the parties. The Golins, it appeared, had accreted allegations to one version or the other. With Court permission, the Golins were allowed to file a complete and correct first amended complaint, which is currently the operative pleading

[3] It is here noted that Mr. and Mrs. Golin filed a habeas petition (their second) purportedly on Nancy's behalf on December 29, 2003. *See Golin, et al. v. Allenby, No.* C 03-05855 WHA. This Court dismissed without prejudice the Golins' first habeas petition for failure to exhaust administrative remedies on November 24, 2003, *Golin v. Allenby,* No. C 03-02889 WHA. The Golins are now back, alleging to have exhausted their claims before the California Supreme Court. It raises issues almost identical to those raised here. An order as to this second habeas petition will issue under separate cover.

tion of due process and equal protection. The second cause of action arises under 42 U.S.C. §1985(3). The contention is that various defendants conspired to deprive Nancy of her liberty and deprive the parents of the company and care of their daughter. The third claim is one for fraud and slander. The complaint alleges that defendants "purveyed knowingly false and slanderous information about the parents and their care of Nancy Golin, alleging abuse and mistreatment in order to carry out their scheme." The Golins contend next that various defendants rendered medical care in a manner of deliberate indifference to Nancy's detriment. The fifth cause of action alleges both the wrongful imprisonment of Nancy Golin and the malicious prosecution of the parents. The sixth claim is one for negligent infliction of emotional distress. As their seventh cause of action, the Golins contend that Nancy has suffered physical injury in state custody, which defendants have actively concealed in violation of Nancy's civil rights. The eighth claim is for the "involuntary" infliction of emotional distress allegedly suffered by both Nancy and the parents as a result of Nancy's conservatorship. The ninth claim is related to the eighth but alleges the intentional infliction of emotional distress. The Golins' tenth claim implicates the Sixth Amendment and takes issue with the legal representation Nancy received during the conservatorship proceeding. The eleventh claim for relief is that since Nancy was removed from her parents' custody, Nancy has been denied her constitutional right to liberty and freedom of association. The last claim arises under the Fourth Amendment. The Golins allege Nancy was taken into custody by the Palo Alto Police Department without a warrant or probable cause.

In the face of these allegations, three defendants have moved to dismiss, namely, the County of Santa Clara, Malorie Street, and Nancy Johnson. Joinders have been filed by other defendants including: Cliff Allenby, Nancy's state-appointed conservator; H. Dean Stiles, counsel for Mr. Allenby in the conservatorship proceeding; Jose Villarreal, Public Defender of Santa Clara County; Jamie Buckmaster of Santa Clara County's Adult Protective Services; the[4] City of Palo Alto; as

[4] The first amended complaint lists two causes of actions as "Count 4," the Golins' claim of deliberate indifference to medical care and their claim of wrongful imprisonment and malicious prosecution. This order assumes the error was

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well as defendant Johnson[5]. Two additional defendants, Ms. Mantilla, who owns and operates Embee Manor, and Lori Kratzer of the Palo Alto Police Department, have answered the complaint. The Golins have filed six separate briefs in opposition to the motions to dismiss and joinders thereto. All matters were heard on March 25, 2004.

ANALYSIS

The following analysis must make the distinction between the claims raised by Mr. and Mrs. Golin on behalf of Nancy versus the claims they raise in their own right. Although this order dismisses all of the claims raised herein, different reasons apply to different claims. The claims made on behalf of Nancy simply cannot go forward. A conservator was appointed for Nancy after a comprehensive, three-week trial before the probate court in Santa Clara County. As such, the Golins do not have standing to assert claims on behalf of their daughter. Moreover, the claims the Golins allege on Nancy's behalf are inextricably intertwined or arise out of the pending conservatorship proceeding described above. Well-established doctrines of abstention prevent this Court from hearing such claims. The Golins, however, also purport to have suffered separate harm as a result of defendants' conduct. To the extent these claims arise out of the underlying order of conservatorship, they are barred. As described more fully below, the claims that do not directly or collaterally challenge Nancy's conservatorship also fail.

WHETHER THE PARENTS HAVE STANDING TO SUE ON BEHALF OF THEIR CONSERVED DAUGHTER.

One of the threshold issues in this case is whether Mr. and Mrs. Golin can seek relief for their daughter Nancy, who has been conserved pursuant to court order. Under federal law, the capacity to bring an action is governed by the law of the forum state. Fed. R. Civ. P. 17(b). In California, "[w]hen ... an

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clerical in nature.

[5] In addition to filing her own motion to dismiss, and joining in the motion to dismiss filed by the County of Santa Clara, defendant Johnson also filed a motion to strike under California's anti-SLAPP statute. She seeks an award of attorney's fees. The argument is that the Golins' claims against Johnson are based solely on Johnson's advocacy on behalf of her client SARC in the conservatorship proceeding, which advocacy falls within the scope of protected activity under the anti-SLAPP statute. Because this order finds that the Court does not have subject-matter jurisdiction to hear the claims related to Nancy's conservatorship, Johnson's special motion to strike and for attorney's fees is **DENIED AS MOOT.**

incompetent person, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate ors by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof. .." Cal. C. Civ. Proc. §372(a). In harmony with this principle, Rule 17(c) further provides that:

> *Whenever an ... incompetent person has a representative such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the ... incompetent person. An incompetent person who does not have a duly appointed representative may sue by next friend or guardian ad litem....*

If an incompetent person is represented, it is only where the representative is unable to or refuses to act or whose interests conflict with the person represented that the incompetent may sue by next friend. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 805 (9th Cir. 1986). As such, a next friend may not be appointed for minors or incompetents who are already adequately represented. *See M.K. v. Harter*, 716 F. Supp. 1333, 1335 (E.D. Cal. 1989).

Also relevant here, constitutional challenges are personal and cannot be asserted vicariously. *United States v. Mitchell*, 915 F.2d 521, 526 (9th Cir. 1990). While a non-attorney may appear pro se on his own behalf, "he has no authority to appear as an attorney for others than himself." *GE. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987). A guardian or parent cannot bring a lawsuit on behalf of a child in federal court without retaining a lawyer (which the Golins have not done). *Johns v. County of San Diego*, 114 F.3d 874 (9th Cir. 1997).

Against this backdrop, it is clear that Mr. and Mrs. Golin have no standing to assert the claims they bring on Nancy's behalf. The state was lawfully appointed Nancy's conservator. There is nothing on this record to support the Golins' contentions that the state-appointed conservator is an inadequate legal representative to warrant the appointment of a next friend or guardian ad litem. It is true that a next friend or guardian ad litem can be appointed where there is a conflict between the representative and the conservatee or where there is an inability or refusal to act. The Golins suggest such a situation exists here and that they should be appointed to represent Nancy's interests. They believe an

order so providing is necessary because they purport to sue the state conservator on Nancy's behalf. This order disagrees.

Even if the Golins were appointed as Nancy's next friend or guardian ad litem, they still could not pursue this action on their daughter's behalf because neither parent is an attorney. More importantly, however, the state court, which presided over the three-week conservatorship trial, made the specific finding that Nancy would be in better hands with a state conservator, as between the state and the parents. As mentioned above, the court expressly found the Golins unfit to act on Nancy's behalf. To now replace the state-appointed conservator and appoint the Golins in his stead would usurp the ruling of the state court. For reasons explained more fully below, various doctrines of abstention urge against such intervention by a federal court. The Golins' recourse is not to seek appointment here but to follow the procedures set forth by California law to challenge the appointment of the state as the conservator of their daughter.

The Golins alternatively argue that this is one of those exceptional civil-rights cases justifying the appointment of counsel. Such an appointment is rare and the alleged circumstances here, although serious, do not warrant the appointment of counsel. Nancy's conservator is Cliff Allenby, who was represented by defendant H. Dean Stiles of the Office of Legal Affairs for the California Department of Developmental Services. In urging that independent counsel be appointed, the Golins proffer little aside from their own disagreement with the probate court's appointment of Mr. Allenby as conservator. There is nothing to suggest Mr. Allenby (or his attorney) has failed to look out for Nancy's best interests. Because the Golins lack standing, the claims they bring on Nancy's behalf are **DISMISSED.**

Still not done, the Golins indicate (albeit vaguely) that they are in the process of retaining counsel for Nancy. The problem, even if counsel were to come into this case on behalf of Nancy, is that to pursue the claims pled in the instant amended complaint would require this Court to review what happened in the probate court or otherwise interfere with the probate court's continuing jurisdiction over the conservatorship. For the additional reasons set forth below, this Court lacks jurisdiction to

hear Nancy's claims.[6]

ABSTENTION UNDER THE ROOKER-FELDMAN DOCTRINE.

As courts of original jurisdiction, federal district courts have no authority to review the final determinations of state courts in judicial proceedings. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 5 (1983). This is true even when the challenge to a state-court decision potentially involves federal constitutional issues. *See Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th 7 Cir. 1986). The doctrine applies to attempts not only to review a state-court decision directly but also to review a state-court decision indirectly when the federal claim is "inextricably intertwined" with the merits of the state-court decision. *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 221 (9th Cir. 1994).

In this case, the first amended complaint is rife with allegations that defendants wrongfully pursued the conservatorship proceeding, improperly removed Nancy from her parents' custody, and violated Nancy's civil rights in so doing. The complaint alleges, for instance, that as a result of the conservatorship proceeding, Nancy's "right to associate with whom she chooses ... has been severely restricted without any showing of good cause ... [and this] represents the most basic denial of Constitutional liberty interests and equal protection of the laws. .." (First Amend. Compl. ¶ 63). The complaint goes on to say that "Nancy Golin's present legal situation leaves her deprived of her liberty by leaving her at risk of losing that liberty considerably further at the discretion of the State" *(id.* at ¶ 64). As a remedy, the Golins seek a "judgment that Nancy Golin be restored immediately to her parent's (sic) custody" *(id.* at §133). But the question of who should have permanent custody of Nancy the state or the parents - was precisely the issue decided by the state court in the three-week conservator-

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[6] The Golins allege in their opposition to the County of Palo Alto's motion to dismiss that they have a "firm verbal commitment" from a "cooperative attorney" who will represent them if the Court approves them as Nancy's guardian ad litem. Plaintiffs, however, fail to provide the name of this attorney or a declaration by the attorney that he or she is prepared to represent Nancy in this case. The Court thus has no context within which to evaluate this issue

ship trial. To reach the issues here would require this Court to find that the Santa Clara County Superior Court wrongly decided the conservatorship case. This, in turn, would result in appellate review of the probate court's order. The *Rooker-Feldman* doctrine bars this inquiry. The Golins claim they are not seeking to overturn the decision of the probate court.

Instead, they argue that the purpose of this action is to:

> *... redress the damages caused by the numerous and continuing violations of Nancy Golin's civil and constitutional rights under color of state law, and those of her parents, during the period from her removal from family care on November 15, 2001 up to the present moment and continuing into the immediate future.*

Opp. 21. They suggest that "[t]he fact that the same set of facts was argued in the Conservatorship trial is merely coincidental in this case" *(id.* at 22). The argument lacks merit. The Golins themselves concede that during the conservatorship trial they raised many of the constitutional issues presented here but that the "arguments and constitutional claims merely fell on deaf ears in the State court" *(ibid.)*. This distinguishes *Brokaw v. Weaver,* 305 F.3d 660, 668 (7th Cir. 2002), a decision to which the Golins cite for the proposition that the *Rooker-Feldman* doctrine does not bar the litigation of claims in federal court where the plaintiffs did not have the reasonable opportunity to raise the claims in the state proceeding. The Golins here, however, raised constitutional claims on Nancy's behalf. They argued that defendants had violated Nancy's "civil and constitutional rights ... to show that the State had already amply proven itself by its wrongful acts as a tort feasor (sic) and a scofflaw to be a bad conservator undeserving of being granted permanent powers in a contest with her parents" (Opp. 22). The probate court rejected the argument.

At the hearing on this matter, Mr. Golin further claimed that *Guarino v. Larsen,* 11 F.3d 1151 (3rd Cir. 1993), supported his position. Mr. Golin relies on the court's statement there that: "A litigant suffers no real harm by attempting to raise his or her constitutional claim in the state court: if the state court refuses to address the constitutional claim, the litigant can then raise the claim in federal court without any jurisdictional, abstention,

or collateral estoppel problems." *Id.* at 1161. The state court here did not refuse to address the constitutional issues. Rather, to ultimately conclude that the state would be a better conservator for Nancy, the probate court necessarily rejected the parents' constitutional challenges. The parents have filed an appeal from the probate court's order. Of course, *any* error committed by the state-court judge (of which the Golins contend there were many) may be properly raised on appeal *in the state court,* rather than in this federal action.

The Golins have a further remedy. Under similar circumstances, the court in *In the Matter of Heldris,* 1996 WL 382916 (N.D. Cal. 1996) (Lynch, J.), noted that while federal courts may review claims alleging the deprivation through state action of a constitutionally-protected interest in life, liberty, or property without due process of law, due process is denied only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. *Id.* at 4.

While the Golins contend that the conservatorship proceeding resulted in a deprivation of their civil rights, they have not been deprived of due process. According to *Heldris:*

> *California provides adequate relief for petitioner's alleged injury. For instance, if petitioner objects to the conservator appointed by the court, as a relative of the conservatee he may petition the court to have the conservator removed and to be appointed the successor conservator himself. Cal. Prob. C. §2561 (removal of conservator), 2681 (appointment of successor conservator). Similarly, petitioner may petition the court to have the conservatorship terminated under Cal. Prob. C. §1861, and may appeal a court order refusing to do so, Cal. Prob. C. §2750. Because California law provides sufficient due process, petitioner's remedy, if any, lies in state court.* Ibid.

That reasoning applies with equal force here. The need for abstention is even more pronounced in light of the continuing jurisdiction of the California state courts over the probate conservatorships they impose. Each conservatorship is reviewed by the probate court one year after its establishment and biannually thereafter. Cal. Prob. C. §1850. Thus, the state court has exclusive and continuing jurisdiction over issues related to Nancy's conservatorship. Claims (of both Nancy and the parents) inextricably intertwined with the conservatorship proceeding

properly lie with the state court.

ABSTENTION UNDER THE *YOUNGER* DOCTRINE.

Subject to a few narrow exceptions, Congress has manifested a desire to permit state courts to try cases free from interference by federal courts. *Younger v. Harris,* 401 U.S. 37, 42 (1971). There is, as a result, a strong policy against federal-court interference with pending state judicial proceedings. *Middlesex County Ethics Comm. v. Garden State Bar Assn,* 25 457 U.S. 423, 431 (1982). The abstention principle, originally applicable only to state criminal proceedings, now applies to civil proceedings in which important state interests are involved. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 604 (1975). For instance, where the state is a party to a state conservatorship proceeding and that proceeding is ongoing, abstention under *Younger* may serve to bar the prosecution of a concurrent federal action. *See Snyder v. Altman,* 444 F. Supp. 1269, 1271-72 (C.D. Cal. 1978).

Absent extraordinary circumstances, abstention under *Younger* is required if the state proceeding is: (1) ongoing; (2) implicates important state interests; and (3) provides the plaintiff an adequate opportunity to litigate federal claims. *San Remo Hotel v. City & County of San Francisco,* 145 F.3d 1095, 1103 (9th Cir. 1998). The case must be dismissed if *Younger* applies. *Delta Dental Plan of California, Inc. v. Mendoza,* 139 F.3d 1289, 1294 (9th Cir. 1998). The three *Younger* factors are clearly met on this record. The relief requested in this case would interfere substantially with the continuing jurisdiction of the probate court over Nancy's conservatorship. The California courts have recognized that a conservatorship is under the continuing jurisdiction of the court which appoints the conservator. *See Guardianship of Kemp,* 43 Cal. App. 3d 758, 766 (1974). As stated, California law requires that the probate court conduct a periodic review of the conservatorship to evaluate its continuing necessity and to review the conditions imposed. *See* Cal. Prob. C. 1850.

The probate action here is ongoing for another reason. The Golins have taken an appeal from the probate court's order that appointed the state as Nancy's conservator (Exhibit 2 to Santa Clara County's Request for Judicial Notice). A state-court proceeding is "ongoing" for the purposes of *Younger* abstention until state appellate review is completed. As mentioned above, any error committed by the state court can

and should be raised by the Golins in their appeal. The first prong of *Younger* is satisfied.

The second prong of *Younger* is also satisfied in this case. Family relations are a traditional area of state concern. *H. C. v. Koppel,* 203 F.3d 610, 612 (9th Cir. 2000). Accordingly, federal courts traditionally decline to exercise jurisdiction "in domestic relations cases when the core issue involves the status of parent and child or husband and wife." *Coates v. Woods,* 819 F.2d 236, 237 (9th Cir. 1987); *Csibi v. Fustos,* 670 F.2d 134, 137 (9th Cir. 1982) (noting that states have an interest in family relations superior to that of the federal government and that state courts have more expertise in the field of domestic relations). The clear challenge here is to the probate court's order removing Nancy from the custody of her parents in favor of the state. This issue is of the domestic type more properly within the purview of the state courts. The third prong of the *Younger* analysis concerns whether a plaintiff has had an adequate or full and fair opportunity to raise federal constitutional claims in the state-court proceeding. *Communications Telesystems Int'l v. California Pub. Util.,* 196 F.3d 1011, 1019 (9th Cir. 1999). A federal court will assume that state procedure will afford an adequate remedy in the absence of unambiguous authority to the contrary. *Pennzoil Co. v. Texaco,* 481 U.S. 1, 15 (1987). There is nothing on this record to suggest that the Golins were denied the opportunity to raise the constitutional claims raised in this federal action. In arguing against abstention, the Golins on this point contend that during the conservatorship trial the probate court "expressed disinterest in reviewing Constitutional or civil rights questions pertinent to the Federal question at hand" (First Amend. Compl. ¶ 126). That does not mean, however, that they did not have an adequate opportunity to litigate the federal claims. Instead, the opposite appears to be true. That is, the Golins concede that they raised many of the constitutional issues presented here but that their "arguments and constitutional claims merely fell on deaf ears in the State court. .." (Opp. 22). There is further nothing preventing plaintiffs from raising their constitutional claims on appeal to the state appeals court, which action is currently pending. Thus, the *Younger* doctrine also applies to bar federal juris-

diction.[7]

WHETHER THE PARENTS CAN PURSUE CLAIMS THAT ARGUABLY DO NOT COLLATERALLY ATTACK THE CONSERVATORSHIP.

In addition to the claims the Golins raise on behalf of their daughter, the first amended complaint also purports to seek relief on claims particular to the parents. Given a fair reading, at least one of these claims appears to be independent of the conservatorship proceeding, or at least does not seek to collaterally attack the probate court's order.' For instance, the Golins raise a claim of malicious prosecution (First Amend. Comps §97-99). Although the operative complaint does not so specify, this order is left to assume that the Golins are pursuing their claim for malicious prosecution under Section 1983. Such a claim is permissible where the alleged prosecution was conducted with the intent to deprive a person of equal protection of the law or otherwise to subject a person to a denial of constitutional rights. *Usher v. City of Los Angeles,* 828 F.2d 556, 562 (9th Cir. 1987). A claim for malicious prosecution under Section 1983 must also meet the state-law elements of the tort including malice and lack of probable cause. *Ibid.*

The Golins' claim focuses on their arrest in November 2001, shortly after Nancy first wandered away from her parents. This gave rise to the investigation which would eventually lead to the appointment of the state as Nancy's limited and then permanent conservator. Both Mr. and Mrs. Golin were criminally charged with the felony of adult dependent abuse *(id.* at 34). According to the Golins' first amended complaint, the charges were dismissed against both parents in 2003 *(id.* at ¶ 98). The problem here, however, is that the Golins have failed to show that the prosecution lacked probable cause or that the case was resolved on the merits in their favor. At the hearing on March 25, 2004, Mr. Golin admitted that the charges against Mrs. Golin had been dropped but that he had pled no contest to one count of violating Cal. Penal C. §368(c), which prohibits crimes against elders and dependent adults. This showing is insuf-

[7] To the extent the parents seek federal relief under 42 U.S.C. 1985(3) on the ground that various defendants conspired to deprive them of the company and care of their daughter, this order finds the claim inextricably intertwined with the probate court's order and thus barred *by Rooker-Feldman.* Federal jurisdiction cannot rest on this claim.

ficient to maintain a claim of malicious prosecution under Section 1983. Without an independent basis of federal jurisdiction, the additional state-law claims specific as to the Golins of fraud and slander and claims of the intentional and negligent infliction of emotional distress (that do not directly challenge the state conservatorship proceeding) cannot go forward. Those claims can be brought in state court. This order will not exercise supplemental jurisdiction over such claims. The claims of the parents are **DISMISSED**

On March 18, 2004, Mr. and Mrs. Golin filed a motion for preliminary injunction seeking to enjoin Nancy's state-appointed conservator Cliff Allenby from fulfilling his duties during the pendency of this action. The motion was assigned a hearing date of April 22, 2004. Because this order specifically finds that the Court is without jurisdiction to adjudicate claims related to Nancy's conservatorship, further briefing on this new request is unnecessary. The motion for a preliminary injunction is **DENIED.** The hearing for said motion is VACATED.

As a final matter, this order addresses the Golins' most recent submission on April 1, 2004, requesting that this Court recuse itself pursuant to an alleged bias or prejudice in favor of defendants herein. The Golins made the same request orally not once but twice at the hearing on March 25, 2004. Mrs. Golin specifically accused the Court of being unable to consider the claims raised herein impartially and according to the law. Her oral requests were denied. The Golins' written recusal request is frivolous. It similarly is **DENIED.** The Golins have now had three separate opportunities (in this action and twice via petitions for habeas corpus) to in good faith demonstrate why they are entitled to relief. They have not done so. Plaintiffs' first amended complaint is **DISMISSED.**

Finding that amendment would be futile, any further relief shall be sought in the Court of Appeals for the Ninth Circuit. A judgment shall issue under separate cover.

IT IS SO ORDERED.

Dated: April 5, 2004.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Attorney or Party Without Attorney: H. Dean Stiles State of Calif., Office of Legal Affairs Department of Developmental Services P. O. Box 944202, MS 2-14 Sacramento, CA 94244-2020 *Telephone No.*: (916) 654-3234 *Attorney for*: Petitioner	[ENDORSED] FILED 03 NOV 10 AM 7:46 KIRI TORRE CHIEF EXEC OFFICER OF/CLERK SUPERIOR COURT OF CA COUNTY OF SANTA CLARA BY_____DEPUTY
SUPERIOR COURT OF CALIFORNIA, *COUNTY OF SANTA CLARA* *STREET ADDRESS*: 191 N. First St. *CITY AND ZIP CODE*: San Jose, CA 95113	
CONSERVATORSHIP OF THE: (checked) *PERSON... OF* Nancy Golin *CONSERVATEE*	
ORDER APPOINTING PROBATE CONSERVATOR (checked) Limited Conservatorship	*CASE NUMBER*: 1-02-PR-151096
WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL LETTERS HAVE BEEN ISSUED	

1. *The petition for appointment of conservator came on for hearing as follows (check boxes c,d,e, and f to indicate personal presence):*
   a. *Judge*: William F. Martin
   b. *Hearing Date*: September 29, 2003 *Time* 9:00am *Dept*: 15
   c. *Petitioner*: Director of Department of Developmental Services
   d. *(checked) Attorney for Petitioner*: H. Dean Stiles
   e. *(checked) Attorney for person cited*: Malorie Street, 120 West Mission St., San Jose, CA 95110 PH. (408) 299-7194
   f. *Person was*: (checked) *present*

THE COURT FINDS

2. *All notices required by law have been given*
3. *Name*: N/A
    a. (unchecked) is unable properly to provide for his or her personal needs for physical health, food, clothing, or shelter
    b. (unchecked) is substantially unable to manage his or her financial resources or resist fraud due to undue influence.
    c. (unchecked) has voluntarily requested appointment of a conservator and good cause has been found for the appointment.
4. *Conservatee*:
    a. (checked) is an adult
    b. (unchecked) [will be an adult on the effective date of this order].
    c. (unchecked) [is a married minor]
    d. (unchecked) [is a minor whose marriage has been dissolved]
5. (checked) *There is no form of medical treatment for which the conservatee has the capacity to give an informed consent,* NOTE: SEE ATTACHMENTS.
   (unchecked) [*Conservatee is an adherent of a religion defined in Probate Code section 2355(b).]*
6. (unchecked) [*Granting the conservator powers to be exercised independently under Probate Code section 2590 is to the advantage and benefit and in the best interest of the conservatorship estate.*]
7. (checked) *Conservatee is not capable of completing an affidavit of voter registration*
8. *(unchecked) [Conservatee has dementia as defined in Probate Code section 2356.5 and the court finds all other facts required to make the orders specified in item 25].*
9. *(checked) Attorney (name):* Malorie Street *has been appointed counsel by the court as legal counsel to represent the conservatee in these proceedings. The cost for representation is: $ (blank) The conservatee has the ability to pay for: (unchecked) all, (checked) none, (unchecked) a portion of this sum (specify): $ (blank)*
10. *(checked) Conservatee need not attend the hearing.*
11. *(unchecked) The appointed court investigator is:* Cynthia Terra
12. *(checked) (for limited conservatorships only) The limited*

conservatee is developmentally disabled as defined in Probate Code section 1420.

Page 1 of 3

ORDER APPOINTING PROBATE CONSERVATOR
(Probate Conservatorship)

(continued to page 2 of form-----→)

(Page 2 of the form order starts here)

CONSERVATORSHIP OF (Name):	*Case Number:*
Nancy Golin, *Conservatee*	*1-02-PR-151096*

13. *(unchecked) The conservator is a private professional conservator as defined in Probate Code section 2341 who has filed with the county clerk the confidential statement required by Probate Code 2342*
14. *(Either a, b, or c must be checked):*
    a. *(checked) The conservator is not the spouse of the conservatee.*
    b. *(unchecked) The conservator is the spouse of the conservatee and not a party to the action or proceeding against the conservatee for legal separation, dissolution, annulment, or adjudication of nullity of their marriage.*
    c. *(unchecked) The conservator is the spouse of the conservatee and is a party to the action or proceeding against the conservatee for legal separation, dissolution, annulment, or adjudication of nullity of their marriage. It is in the best interests of the conservatee to appoint the spouse as conservator.*

THE COURT ORDERS;

15. a. *(Name) Director, Department of Developmental Services (Address): 1600 Ninth Street, Room 240, Sacramento, CA 95814, (Telephone): (916) 654-3476*
    is appointed (unchecked) conservator, (checked) limited conservator: of the PERSON of (name) Nancy Golin
    b. *(Name): (blank)*
    (Address): (blank) *Telephone: (blank)*
    is appointed: (unchecked) conservator, (unchecked) limited conservator of the ESTATE of (name) (blank) and letters of conservatorship shall issue upon qualification
16. *(unchecked) Conservatee need not attend the hearing*
17. a. *(checked) Bond is not required*
    b. *(unchecked) [Bond is fixed at $ (blank) to be furnished*

by an authorized surety company or as otherwise provided by law]

c. *(unchecked) Deposits of $ (blank) are ordered to be placed in a blocked account at (specify institution and location): (blank) and receipts shall be filed No withdrawals shall be made without a court order (unchecked) Attachment orders in Attachment 17c*

d. *(unchecked) The conservator is not authorized to take possession of money or any other property without a specific court order.*

18. *(unchecked) For legal services rendered, (unchecked) conservatee, (unchecked) conservatee's estate, (unchecked) parents of the minor, (unchecked) minor's estate shall pay to (name) (blank) the sum of $ (blank) (unchecked) forthwith, (unchecked) as specified in Attachment 18, (unchecked) as follows (specify terms, including any combination of payors): (blank)*
19. *(checked) Conservatee is disqualified from voting*
20. *(checked) Conservatee lacks the capacity to give informed consent for medical treatment and the conservator of the person is granted the powers as defined in Probate Code section 2355. (unchecked) The treatment shall be performed by an accredited practitioner of a religion as defined in Probate Code section 2355(b).* NOTE SEE ATTACHMENTS 28-31 No. 4.
21. *(unchecked) The conservator of the estate is granted authorization under Probate Code section 2590 to exercise independently the powers specified in Attachment 21 (unchecked) subject to the conditions provided.*
22. *(unchecked) Orders relating to the capacity of the conservatee under Probate Code section 1873 or 1901 as specified in Attachment 22 are granted.* NOTE: SEE ATTACHMENTS 28-30, No 3..
23. *(unchecked) Orders relating to the powers and duties of the conservator of the person under Probate Code sections 2351-*2358 as specified in Attachment 23 are granted: (Do not include orders under Probate Code section 2356.5 relating to dementia)
24. *(unchecked) Orders relating to the conditions imposed under Probate Code section 2402 upon the conservator of the estate are specified in Attachment 24 are granted.*
25. a. (unchecked) he conservator of the person is granted au-

thority to place conservatee n a care of nursing facility described in Probate Code section 2356.5(b).

b. (unchecked) The conservator of the person is granted authority to authorize the administration of medications appropriate for the care and treatment of dementia as described in Probate Code section 23

ORDER APPOINTING PROBATE CONSERVATOR
(Probate Conservatorship)

(continued to page 3 of form-----→)

(Page 3 of form starts here)

CONSERVATORSHIP OF (Name):	*Case Number:*
Nancy Golin, *Conservatee*	*1-02-PR-151096*

26. (unchecked) *Other Orders as specified in Attachment 26 are granted*
27. (unchecked) *The probate referee appointed is (name and address) (blank)*
28. (checked) *(For limited conservatorship only) Orders relating to the limited powers and duties of the limited conservator of the person under Probate Code section 2351.5 as specified in Attachment 28 are granted.*
29. (unchecked) *(For limited conservatorship only) Orders relating to the limited powers and duties of the limited conservator of the estate under Probate Code section 1830(b) as specified in Attachment 29 are granted.*
30. (checked) *(For limited conservatorship only) Orders limiting the civil and legal rights of the limited conservator as specified in Attachment 30 are granted.*
31. *(checked) This order is effective on the (checked) date signed, (unchecked) date minor attains majority (specify) (blank)*
32. *Number of boxes checked in Items 15-31*: 7
33. *Number of pages attached*: 2

Date: Nov 07 2003

s/ WILLIAM F. MARTIN
(JUDGE OF THE SUPERIOR COURT)
(checked) SIGNATURE FOLLOWS LAST ATTACHMENT

ORDER APPOINTING PROBATE CONSERVATOR
(Probate Conservatorship)

Limited Conservatorship of the Person of:
NANCY GOLIN

Case Number:
1-02-PR-151096

ATTACHMENT 28

Powers and duties of the limited conservator of the person pursuant to Probate Code section 2351.5 are granted as follows:

1. Full powers to fix the residence of specific dwelling of the limited conservator.
2. Full power to consent, refuse consent, or otherwise control access to the confidential records and papers of the limited conservatee;
3. Full powers to control the limited conservatee's right to contract;
4. Exclusive authority to give or withhold consent for and to require the limited conservator to receive medical treatment, in accordance with section 2355 of the Probate Code;
5. Full powers to control the limited conservator's social and sexual contracts and relationships; and
6. Full powers to make all decisions concerning the habilitation and education of the limited conservatee.

ORDER APPOINTING LIMITED CONSERVATOR (ATTACHMENT 28)

Limited Conservatorship of the Person of:
NANCY GOLIN

Case Number:
1-02-PR-151096

ATTACHMENT 30

IT IS HEREBY ORDERED: that the civil and legal rights of the Limited Conservator herein shall be suspended for an indefinite period of time as set forth below:

1. Power to fix the residence or specific dwelling of the limited conservatee;
2. Power to consent, refuse consent or otherwise control access to the confidential records and papers of the limited conservatee;
3. Powers of the limited conservatee to contract;
4. Power to give or withhold consent for medical treatment;
5. Power to control the limited conservatee's social and sexual contacts and relationships, and
6. power to make decisions concerning the habilitation and education of the limited conservatee.

Dated: Nov 07 2003

s/WILLIAM F. MARTIN

JUDGE OF THE
SANTA CLARA COUNTY SUPERIOR
COURT

ORDER APPOINTING LIMITED CONSERVATOR (ATTACHMENT 30)

APPENDIX B

ASSOCIATED OPINIONS AND ORDERS BELOW

Page	Document
a-28	May 12, 2004: US District Court, Northern District of California, Denial of Certificate of Appealability (3-03-cv-05855)
a-31	April 6, 2004, Orders of the District Court dismissing Plaintiffs' Petition for Habeas Corpus, Northern District of California (Case No. C 03-05855 WHA).
a-35	October 21, 2003, Letter from Nancy J. Johnson of Berliner-Cohen at end of probate trial proposing highly restrictive supervised visitation conditions at SARC's discretion under SARC's powers to control social contacts, between Nancy Golin and her parents, to Judge William Martin at end of trial.
a-39	June 22, 2005: Memorandum of the Ninth Circuit Court of Appeals Three Judge Panel, (Kleinfeld, Tajima, Thomas), *Smith v. Riverside County*, 2005 WL 1473958 (9th Cir.(Cal.)), Case No. 04-55697reversing denial of District Court.

FILED
2004 MAY 12 PM 4:32
RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST OF CA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 03-05855 WHA

ELSIE Y. GOLIN and JEFFREY R. GOLIN,
Petitioners
v.
CLIFF ALLENBY, Director of the California Department of Developmental Services,
Respondent,
and
NANCY GOLIN,
Real Party in Interest

DENIAL OF CERTIFICATE OF APPEALABILITY

This is a habeas case under 28 U.S.C. 2254 filed pro se by petitioners Elsie Y. Golin and Jeffrey R. Golin on behalf of their adult, developmentally-disabled daughter Nancy Golin.

Respondent Cliff Allenby of the California Department of Developmental Services is Nancy's conservator. The petition filed herein challenged respondent's appointment as Nancy's conservator. The petition was dismissed on April 5, 2004. Judgment was thereafter entered on April 6, 2004. Mr. and Mrs. Golin have filed a notice of appeal. Although they do not request a certificate of appealability, the notice of appeal will be deemed a request for the certificate. See *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

A petitioner may not appeal a final order in a federal habeas corpus proceeding without first obtaining a certificate of appealability (formerly known as a certificate of probable cause to appeal). 28 U.S.C. 2253(c); Fed. R. App. P. 22(b). A judge shall grant a certificate of appealability "only if the applicant has made a sub-

stantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). The certificate must indicate which issues satisfy this standard. Id. at 2253(c)(3).

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy Section 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In this case, however, the dismissal was based on issues antecedent to the merits. Section 2253(c)(1) also applies to an appeal of a final order entered on procedural issues antecedent to the merits, for instance a dismissal on standing and jurisdictional grounds, as here. Ibid.

Determining whether a certificate of appealability should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Id. at 484-85.When the district court denies a petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id* at 484. As each of these components is a "threshold inquiry," the district court "may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." *Id.* at 485. Supreme Court jurisprudence "allows and encourages" district courts to first resolve procedural issues, as was done here. Ibid. The petition in this case was dismissed for two reasons. First, the Court held that Mr. and Mrs. Golin lacked standing to seek federal habeas relief on behalf of their daughter. Notwithstanding an order of a state probate court appointing respondent as Nancy's conservator after a three-week trial, the Golins attempted to proceed as Nancy's next friend. The Court found the Golins had failed to meet the test for next-friend status. Second, the petition was dismissed on jurisdictional grounds. The primary focus of the Golins' petition was their contention that they, rather than respondent, should have been appointed Nancy's conservator.

The Court found that the Golins could not seek to relitigate a determination of parental rights or child custody via a federal peti-

tion for writ of habeas corpus. Jurists of reason would not find it debatable whether the Court was correct in its procedural rulings. As such, the certificate of appealability implied from the notice of appeal is DENIED. The Clerk of the Court shall transmit the file, including a copy of this order, to the Court of Appeals. Mr. and Mrs. Golin may then ask the Court of Appeals to issue the certificate, or if they do not, the notice of appeal will be construed as such a request.

IT IS SO ORDERED

Dated: May 12, 2004.

S/ (WHA)_____
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

FILED
APRIL 6, 2004
CLERK, US DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

No. C 03-05855 WHA

ELSIE Y. GOLIN and JEFFREY R. GOLIN,
Petitioners
v.
CLIFF ALLENBY, Director of the California Department of Developmental Services,
Respondent,
and
NANCY GOLIN,
Real Party in Interest.

This is the second time the parties have appeared before this Court on habeas corpus.

On November 23, 2003, this Court dismissed the first petition of Jeffrey and Elsie Golin for writ of habeas corpus (No. 03-2889 WHA) for failure to exhaust administrative remedies. Mr. and Mrs. Golin were there represented by counsel. The first petition sought the release of Nancy Golin, the Golins' adult, developmentally-disabled daughter, who was then under temporary conservatorship. A copy of this Court's dismissal order is appended for the convenience of the Court of Appeals. The Golins now purport to have exhausted their state remedies. The instant petition was filed December 29, 2003. Mr. and Mrs. Golin, now proceeding in pro per, seek the same remedy - to regain the custody of their daughter.

The heart of the instant dispute arises out of a state conservatorship proceeding in the Santa Clara County Superior Court involving Nancy, who is 33-years old. The issue in the state court was who would be appointed Nancy's conservator.

The California Department of Developmental Services, acting through the San Andreas Regional Center, a not-for-profit corporation, and Embee Manor, where Nancy currently resides, petitioned the probate court for the appointment. Mr. and Mrs. Golin filed a competing petition.

Following a three-week trial (in which the parents represented themselves), the probate court found, based upon clear and convincing evidence, that Nancy lacked the capacity to provide for her own personal needs for physical health, food, clothing and shelter, and to manage her own financial resources. The court also concluded, again based upon clear and convincing evidence that Nancy's parents were unable to provide for Nancy's best interests.

The court made three specific findings, each by clear and convincing evidence, specific as to the Golins. *First,* the court found "that both Mr. and Mrs. Golin are presently unable to provide for the best interests of their daughter, Nancy Golin, because of their history of continuous conflicts with most medical and other professionals." *Second,* "a history of marital conflict between the parents rendered them unfit to serve as their daughter's conservator." *Third,* the court found that the Golins' had a history of neglecting and abusing their daughter, rendering them unable and unfit to provide for the best interests of Nancy as her conservator. As a result, the court appointed respondent Cliff Allenby, director of the Department of Developmental Services, as Nancy's permanent limited conservator. Attached to this order is a copy of the probate court's order, from which the Golins have taken an appeal, and of which this Court has taken judicial notice in a related civil suit described more fully below.

This order holds that Mr. and Mrs. Golin lack standing to seek federal habeas relief on behalf of their daughter. As mentioned, an order of the state court appointed respondent as Nancy's permanent limited conservator. The order expressly found the Golins incapable of taking care of their daughter. It would thus appear that respondent, if anyone, would have standing to challenge Nancy's custody (assuming she is in custody).

The Golins, however, contend to be proceeding as Nancy's next friend. There is a test, however, for next-friend status. In determining whether a next-friend petition is appropriate in the circumstances of a particular case, courts consider the status of the third-party petitioner and the status of the

person in custody on whose behalf the third party is seeking to act. These requirements are jurisdictional, and the third-party petitioner bears the burden of proving that both requirements are satisfied. The Golins have not met their burden on this record.

The Golins contend that:

> *The State has failed both tests and on both tests Petitioners are the most effective representative available of Nancy Golin and therefore assert third party standing to represent Nancy Golin's interests as next friends.*

Pet. 49. Such an assertion completely ignores the order of the probate court, which after a three-week trial found that Nancy's interests would be better served with respondent as her conservator rather than her parents. The probate court's finding specifically controverts the Golins' assertion that "No one has better claim than Petitioners to `next friend' status for the purpose of this proceeding, as we have demonstrably always put her interests ahead of our own" *(ibid.)*. This is sufficient to deny the Golins next-friend status.

This petition must be dismissed for another reason. The Golins' primary contention involves a disagreement with the probate court's appointment of respondent as Nancy's conservator. Federal habeas corpus, however, has never been available to challenge parental rights or child custody. See *Lehman v. Lycoming County Children's Services*, 458 U.S. 505-11 (1982). A federal habeas petition challenging a state's child-custody determination simply seeks to relitigate the petitioner's interest in his or her own parental rights. *Ibid.* A federal court has no jurisdiction to relitigate these interests - federal courts are not courts of appeal from state decisions. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-5 (1983). To extend the federal writ of challenges to state child-custody decisions based on alleged constitutional defects collateral to the actual custody decision would be an unprecedented expansion of the jurisdiction of the federal courts. *See Lehman*, 458 U.S. at 512.

The Golins' attack here on federal habeas (like their challenge under Section 1983) looks to relitigate those custodial rights squarely determined in the state court. Mr. and Mrs. Golin were given every opportunity to petition for the appointment as Nancy's conservator. They lost. The decision is on appeal. This is not the place to relitigate what happened below. Moreover, California law provides remedies to persons in petitioners'

position. California probate courts have continuing jurisdiction over the conservatorships they impose. Each conservatorship is reviewed by the probate court one year after its establishment and biannually thereafter. Cal. Prob. C. §1850. Thus, the state court has exclusive and continuing jurisdiction over issues related to Nancy's conservatorship. If any constitutional challenges lie (a matter this order does not reach), they are within the purview of the probate court. This matter simply does not belong in federal court. The petition for writ of habeas corpus is **DISMISSED.**

Dated: April 5, 2004
WILLIAM H. ALSUP
UNITED STATES DISTRICT JUDGE

BERLINER COHEN
ATTORNEYS AT LAW

October 21, 2003 VIA HAND DELIVERY

Honorable William F. Martin

Dear Judge Martin:

At the conclusion of trial on Friday, you asked for letter briefs to address the issue of visitation between Mr. and Mrs. Golin and their daughter Nancy, in the event you granted the Department of Developmental Services' ("DDS") petition for limited conservatorship. Since San Andreas Regional Center ("SARC") would implement the conservatorship with control of visits falling within the exercise of the social power, I am responding to your inquiry.

As was stated during trial, SARC favors contact and visits, but must keep Nancy's best interests in the forefront, and must also remain cognizant of the effect Mr. and Mrs. Golins' conduct has on other people involved in Nancy's care. Although we have not had input from the Golins on their desires and suggestions for visitation, in the absence of an agreement to the contrary, SARC's plan would be as follows.

Continue Supervised Visitation For At Least Six Months. SARC **believes that supervised visitation should continue for some period of time while the Golins adjust to the reality of a DDS permanent conservatorship** (emph added), and to protect against disruptions at Nancy's care home. SARC believes that six months is appropriate because serious consideration is being given to finding a new community residential care home for Nancy. If such a move occurs, Nancy will need time to adjust, and may exhibit some behaviors during the adjustment period which could be misinterpreted by the Golins if they were alone with Nancy. Supervised visitation would also allow for new care providers to adjust to the situation with Nancy and her parents. SARC remains willing to have Ms. Lamb supervise the visits, but only if that is acceptable to her and to the Golins. Alternatively, one of SARC's vendors is willing to provide someone to supervise visits and work out a schedule with the Golins. SARC had previously advised the Golins that it will consider anyone they wish to propose, but Mimi Kinderlehrer and Tucker Liske from SARC must meet with that person ahead of time, discuss conditions of visitation with them, and be reasonably satisfied that the person

will be able to supervise. The Golins did not propose anyone in the past but if they do have someone in mind, that option is still available.

Visitation would be arranged in advance, with reasonable notice to the care provider, and would occur on Saturdays or Sundays for up to 2 hours in duration, between 1 p.m. and 5 p.m. (emph added). SARC would be flexible on the timing if there are occasions when the Golins desire longer visits and the visit supervisor can accommodate, Visits would need to take place outside of the care home but in Santa Clara County, unless another location was agreed to in advance. Nancy's dietary restrictions must be followed if she is given any food or beverage during the visits. **The Golins may not take Nancy to visit health care professionals during their visitation time** and may not dispense medication to her. If the Golins drive Nancy in their vehicle, the driver must have a valid drivers' license, the license numbers must be given to 'SARC in, advance so that confirmation of validity can be obtained, and the vehicle must have a current, valid registration. The Golins must not be disruptive at the care home if they come to the home at the start or conclusion of the visits. Disruptions include rude behavior toward, or arguing with, staff or the administrator, interrogating other residents, searching the premises, or other behavior identified by the staff or administrator as causing unreasonable problems for the staff or residents.

Future Unsupervised Visitation. **SARC is willing to work with the Golins toward a goal of unsupervised visitation to begin at the end of a successful six month period of actual supervised visits.**[8] To move into unsupervised visitation, SARC suggests that the following conditions be met: (1) the Golins must have actually participated in the six months of supervised visitation and complied with the conditions of supervised visitation noted above, including returning Nancy on time, (2) visits must be arranged with the care home reasonably in advance so that the care home is aware of when visits will be occurring, so the visits do not conflict with other activities such as Nancy's day program or a planned outing, and so the visits do

[8] SARC wishes to avoid a situation in which the Golins elect not to avail themselves of supervised visitation, and then expect to commence unsupervised visits.

not conflict with the times during which medication needs to be administered (all of which will essentially mean visits on a Saturday or Sunday between 1 and 5 p.m., with no overnight visits), (3) whichever parent drives Nancy in a vehicle must have a valid drivers' license, and the vehicle must have a valid, current registration, (4) the Golins must first provide SARC with their current residence address and telephone number, (5) Nancy's dietary restrictions must be complied with, (6) **Nancy may not be taken to health care professionals**, (7) **Nancy must stay in Santa Clara County** unless another location is approved in advance, (8) **the visits must occur outside of the care home** unless the care provider agrees to allow visits within the home, (9) the parents must leave word with the care provider of the expected place(s) of each visit before removing Nancy from the home and must leave their cell phone or other contact telephone number, and (10) the parents may not be disruptive at the care home, as described above. Violations of the conditions could result in re-establishing supervised visits.

Other Input. As I was leaving the courtroom Friday afternoon, I heard you mention to Mr. Golin that his letter brief to you could also address what type of access he and Mrs. Golin should receive to information concerning Nancy. Therefore, I wanted to address that issue briefly, again not knowing what the Golins have in mind. SARC does intend to keep Mr. and Mrs. Golin abreast of information concerning their daughter, with the main point of contact being Nancy's service coordinator or district manager. SARC would provide the Golins with copies of the periodic reports prepared by the day program and care home, and would advise the Golins of changes in Nancy's medication regimen or other significant changes in her health or program. If the Golins wish to speak to Nancy's doctors to obtain information about her medical conditions and treatment, they can contact SARC with that request, and SARC will attempt to arrange for a time and manner for that contact to occur, subject to and depending upon the wishes of the physicians. SARC is very sensitive to this issue because contact between the Golins and Nancy's doctors has been very problematic in the past, and SARC does not want the Golins' behavior to jeopardize a doctor's

willingness to provide care to Nancy. Therefore, SARC strongly believes it is in Nancy's best interests for it to retain full control in this area.

Please let me know if you desire any additional input. Thank you for the considerable time and attention you have devoted to this challenging case.

Very truly yours,

BERLINER COHEN
NANCY J. JOHNSON

2005 WL 1473958 (9th Cir.(Cal.))

Only the Westlaw citation is currently available.

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals, Ninth Circuit.

Michael SMITH, individually and as Parent and Natural Guardian of Angela A. Smith, a Minor Child, Plaintiff--Appellant,
v.
COUNTY OF RIVERSIDE; et al., Defendants--Appellees.

No. 04-55697.
D.C. No. CV-03-00746-RJT.
Submitted June 14, 2005. [FN**]

FN** The panel unanimously finds this case suitable for decision without oral argument. *See* FED. R.APP. P. 34(A)(2).

Decided June 22, 2005.

Michael Smith, Desert Hot Springs, CA, pro se.

Bruce E. Disenhouse, Esq., Kinkle, Rodiger & Spriggs, Riverside, CA, Christopher D. Lockwood, Arias Lockwood & Gray, San Bernadino, CA, for Defendants--Appellees.

Appeal from the United States District Court for the Central District of California, Robert J. Timlin, District Judge, Presiding.

Before KLEINFELD, TASHIMA, and THOMAS, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

*1 Michael Smith appeals pro se the district court's order dismissing his 42 U.S.C. §1983 action alleging that various state and county officials deprived him of his constitutional rights when they removed his daughter from his home following allegations of child abuse. We have jurisdiction pursuant to 28 U.S.C. §1291.

We review de novo a dismissal pursuant to the Rooker-Feldman doctrine. See *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir.2003). We vacate and remand.

The gravamen of Smith's federal action is that the county officials who removed Smith's minor daughter, Angela, from his home, and Judge Block, who presided over Smith's state action, violated his federal constitutional rights. In light of an intervening Supreme Court decision, Smith's action is not barred by the Rooker-Feldman doctrine because his complaint does not allege that the state court judgment was erroneous. See EXXON MOBIL CORP. V. SAUDI BASIC INDUS. CORP., --- U.S. ----, ---- - ----, 125 S.CT. 1517, 1521-22, 161 L.ED.2D 454 (2005) (confining application of the Rooker-Feldman doctrine to state-court losers complaining of injuries caused by state-court judgments and seeking review and rejection of those judgments).

Smith's pending motions are denied.

VACATED and REMANDED.

C.A.9 (Cal.) 2005.

Smith v. County of Riverside

2005 WL 1473958 (9th Cir.(Cal.))

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[9]

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitutional Article VI:

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

U.S. Constitutional Amendment I:

Congress shall make no law *respecting an establishment of religion, or prohibiting the free exercise thereof; or* **abridging the freedom of speech**, *or of the press;* **or the right of the people peaceably to assemble**, *and* **to petition the government for a redress of grievances.**

U.S. Constitutional Amendment IV:

The right of the people to be secure in their persons, *houses, papers, and effects,* **against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation**, *and* **particularly describing** *the place to be searched,* **and the persons** *or things* **to be seized.**

U.S. Constitutional Amendment V:

No person shall *be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;*

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[9] (relevant passages emphasis added)

nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of life, liberty, or property, without due process of law;** *nor shall private property be taken for public use, without just compensation.*

U.S. Constitutional Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to *a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to* ***be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.***

U.S. Constitutional Amendment VII:

In suits at common law, *where the value in controversy shall exceed twenty dollars,* **the right of trial by jury shall be preserved,** *and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.*

U.S. Constitutional Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted.**

U.S. Constitutional Amendment IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Constitutional Amendment X:

The powers not delegated to the United States by the Constitution, *nor prohibited by it to the states,* **are reserved** *to the states respectively, or* **to the people.**

U.S. Constitutional Amendment XIV:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. **No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....**

Section 5: **The congress shall have the power to enforce**

by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS INVOLVED

A. FEDERAL CIVIL RIGHTS STATUTES

42 U.S.C. §1983: Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. ...

42 U.S.C. §1985(3): Conspiracy to Interfere with Civil Rights

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §12132: Discrimination of the handicapped

Subject to the provisions of this title, **no qualified individual with a disability shall, by reason of such disability,** be

excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, **or be subjected to discrimination by any such entity.**

B. FEDERAL PROCEDURE AND JURISDICTION STATUTES

28 U.S.C. §144: Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, ***such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.***

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §1254(1): Supreme Court Jurisdiction

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1343: Civil rights and elective franchise

a) *The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:*

(1) *To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;*

(2) *To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;*

(3) *To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;*

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

C. CODE OF FEDERAL REGULATIONS

28 C.F.R. §35.130(d) General prohibitions against discrimination

A public entity shall administer services, programs, and activities ***in the most integrated setting appropriate*** *to the needs of qualified individuals with disabilities.*

28 C.F.R. Pt. 35, App. A, p. 450 (1998): Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991)

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, i.e., ***in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible,*** *and that persons with disabilities must be provided the option of declining to accept a particular accommodation.*

45 C.F.R. §164.502 (HIPAA)

§164.502 Uses and disclosures of protected health information: general rules.

(5) Implementation specification: Abuse, neglect, endangerment situations. Notwithstanding a State law or any requirement of this paragraph to the contrary, a covered entity may elect not to treat a person as the personal representative of an individual if:

(i) **The covered entity has a reasonable belief that**:

(A) **The individual has been or may be subjected to domestic violence, abuse, or neglect by such person**; or

(B) **Treating such person as the personal representative could endanger the individual**; and

(ii) **The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative**.

45 C.F.R. §164.512(e) (HIPAA)

Uses and disclosures for which an authorization or opportunity to agree or object is not required.

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose pro-

tected health information in the course of any judicial or administrative proceeding:

(i) **In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order**; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, ...

D. CALIFORNIA CIVIL PROCEDURE CODE STATUTES

Cal. C. Civ. Proc. §372(a): Minors, incompetent persons or persons for whom conservator appointed; appearance by guardian, conservator or guardian ad litem; powers; disposition of moneys recovered; waiver of juvenile law rights

When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party, that person shall appear ***either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case.***

Cal. C. Civ. Proc. §634: Omission or ambiguity brought to attention of trial court; inference

When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, ***it shall not be inferred on appeal*** *or upon a motion under Section 657 or 663* ***that the trial court decided in favor of the prevailing party as to those facts or on that issue.***

Cal. C. Civ. Proc. §656. Motion for New Trial

A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee. Cal. C. Civ. Proc. §657: New Trials

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. ***Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from***

having a fair trial....

3. ***Accident or surprise, which ordinary prudence could not have guarded against. ...***
6. ***Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.***
7. ***Error in law, occurring at the trial and excepted to by the party making the application....***

Cal. C. Civ. Proc. §663.

A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:

1. ***Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.***

2. A judgment or decree not consistent with or not supported by the special verdict.

E. CALIFORNIA HEALTH AND SAFETY CODE STATUTES

Cal. Hlth. & S. C. §416.5: Nomination of director as guardian or conservator

The director may be nominated by any one of the following to act as guardian or conservator for any developmentally disabled person; (1) who is or may become eligible for the services of a regional center, or (2) who is a patient in any state hospital, and who was admitted or committed to such hospital from a county served by a regional center:

(a) A parent, relative or friend.

(b) The guardian or conservator of the person or estate, or person and estate, of the developmentally disabled person to act as his successor.

(c) The developmentally disabled person.[10]

Such nomination shall be in writing and may provide that the authority of the director is to take effect at some date or occurrence in the future that may be fixed in the nomination

The director shall promptly accept or reject such nomi-

[10] None of these eligible parties nominated the director for this petition.

nation in writing. *His acceptance shall be binding upon him and his successors. Any nomination to take effect in the future may be withdrawn by the nominator before its effective date.*

Cal. Hlth. & S. C. §416.9: Appointment of director as guardian or conservator; effect; request for adjudication of incompetency

The court may appoint the Director of Developmental Services as guardian or conservator of the person and estate or person or estate of a minor or adult developmentally disabled person. ***The preferences established in Section 1812 of the Probate Code for appointment of a conservator shall not apply.*** *An appointment of the Director of Developmental Services as conservator shall not of itself constitute a judicial finding that the developmentally disabled person is legally incompetent. The petition for the appointment of the Director of Developmental Services as conservator of an adult developmentally disabled person may include a request that the court adjudge the developmentally disabled person to be legally incompetent or such an adjudication may be made subsequently upon a petition made, noticed, and heard by the court in the same manner as a petition for the appointment of the director as conservator. ....*

Cal. Hlth. & S. C. §416.23: Care and treatment of developmentally disabled person; consent of parent, guardian or conservator

This article does not authorize the care, treatment, or supervision or any control over any developmentally disabled person without the written consent of his parent or guardian or conservator.

F. CALIFORNIA PENAL CODE STATUTES

Cal. Penal C. §368(c): Crimes against Elders or Dependent Adults

Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered, is guilty of a misdemeanor. A second or subsequent violation of this subdivision is punishable by a fine not to exceed two thousand dollars ($2,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

G. CALIFORNIA PROBATE CODE STATUTES

Cal. Prob. C. §1310(b):

"Notwithstanding that an appeal is taken from the judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary, or may appoint a temporary guardian or conservator of the person or estate, or both, or special administrator, to exercise the powers, from time to time, as if no appeal were pending...

Cal. Prob. C. §1850: Review of conservatorship; application

(a) Except as provided in subdivision (b), each conservatorship initiated pursuant to this part shall be reviewed by the court one year after the appointment of the conservator and biennially thereafter....

Cal. Prob. C. §1861. Petition; persons authorized to file; contents

(a) A petition for the termination of the conservatorship may be filed by any of the following:

(1) The conservator.

(2) The conservatee.

(3) The spouse, or domestic partner, or any relative or friend of the conservatee or other interested person.

(b) The petition shall state facts showing that the conservatorship is no longer required.

Cal. Prob. C. §1812: Order of preference for appointment as conservator

(b) Subject to Sections 1810 and 1813, of persons equally qualified in the opinion of the court to appointment as conservator of the person or estate or both, preference is to be given in the following order:

(1) The spouse or domestic partner of the proposed conservatee or the person nominated by the spouse or domestic partner pursuant to Section 1811.

(2) An adult child of the proposed conservatee or the person nominated by the child pursuant to Section 1811.

(3) A parent of the proposed conservatee or the person nominated by the parent pursuant to Section 1811.

(4) A brother or sister of the proposed conservatee or the person nominated by the brother or sister pursuant to Section 1811.

*(5) Any other person **or entity** eligible for appointment as a conservator under this code **or, if there is no person or entity willing to act as a conservator, under the Welfare and Institutions Code.***

(c) The preference for any nominee for appointment under paragraphs (2), (3), and (4) of subdivision (b) is subordinate to the preference for any other parent, child, brother, or sister in that class.

H. CALIFORNIA WELFARE AND INSTITUTIONS CODE STATUTES

Cal. Welf. & Inst. C. §4502: Lanterman Developmental Disabilities Services Act.

*"**Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California.** No otherwise qualified person by reason of having a developmental disability shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, which receives public funds It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following:*

*"(a) **A right to treatment and habilitation services and supports in the least restrictive environment.** Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible. **Such services shall protect the personal liberty of the individual and shall be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, or supports.***

*"(b) **A right to dignity, privacy, and humane care. To the maximum extent possible, treatment, services, and supports shall be provided in natural community settings.***

"(c) A right to participate in an appropriate program of publicly supported education, regardless of degree of disability.

*"(d) **A right to prompt medical care and treatment.***

"(e) A right to religious freedom and practice.

*"(f) **A right to social interaction and participation in community activities.***

"(g) A right to physical exercise and recreational opportunities.

*"(h) **A right to be free from harm, including unnecessary***

physical restraint, or isolation, excessive medication, abuse, or neglect.

"(i) A right to be free from hazardous procedures.

*"(j) **A right to make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way they spend their time, including education, employment, and leisure, the pursuit of their personal future, and program planning and implementation.**"*

Cal. Welf. & Inst. C. §4503 Lanterman Developmental Disabilities Services Act

"Each person with developmental disabilities who has been admitted or committed to a ..., community care facility as defined in Section 1502 of the Health and Safety Code, ... shall have the following rights...:

"(a) To wear his or her own clothes, to keep and use his or her own personal possessions including his or her toilet articles, and to keep and be allowed to spend a reasonable sum of his or her own money for canteen expenses and small purchases.

"(b) To have access to individual storage space for his or her private use.

*"(c) **To see visitors each day**.*

"(d) To have reasonable access to telephones, both to make and receive confidential calls.

"(e) To have ready access to letter writing materials, including stamps, and to mail and receive unopened correspondence.

"(f) To refuse electroconvulsive therapy.

*"(g) **To refuse behavior modification techniques which cause pain or trauma.***

"(h) To refuse psychosurgery notwithstanding the provisions of Section 5325, 5326, and 5326.3....

"(i) To make choices in areas including, but not limited to, his or her daily living routines, choice of companions, leisure and social activities, and program planning and implementation.

"(j) Other rights, as specified by regulation."

(emphases added).

Cal. Welf. & Inst. C. §4620.1

*"The Legislature recognizes the ongoing contributions many parents and family members make to the support and well-being of their children and relatives with developmental disabilities. **It is the intent of the Legislature that the important nature of these relationships be respected and fostered by re-***

gional centers and providers of direct services and supports."

Cal. Welf. & Inst. C. §5008

Unless the context otherwise requires, the following definitions shall govern the construction of this part:

(h)(1) For purposes of Article 1 (commencing with Section 5150),Article 2 (commencing with Section 5200), and Article 4 (commencing with Section 5250) of Chapter 2, and for the purposes of Chapter 3(commencing with Section 5350), "gravely disabled" means either of the following:

(A) A condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.

(B) A condition in which a person, has been found mentally incompetent under Section 1370 of the Penal **Code** *and all of the following facts exist:*

(i) The indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person.

(ii) The indictment or information has not been dismissed.

(iii) As a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner.

(2) For purposes of Article 3 (commencing with Section 5225) and Article 4 (commencing with Section 5250), of Chapter 2, and for the purposes of Chapter 3 (commencing with Section 5350), ***"gravely disabled" means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter.***

(3) ***The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.***

Cal. Welf. & Inst. C. §5150: Dangerous or gravely disabled person; taking into custody; application; basis of probable cause; liability

When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, *a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county*

*may, **upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.** Such facility shall require an application in writing stating the circumstances under which the person's condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. **If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he or she knows to be false.***

Cal. Welf. & Inst. C. §5150.05. Determination of probable cause to take person into custody or cause person to be taken into custody

*A. When determining if probable cause exists to take a person into custody, or cause a person to be taken into custody, pursuant to Section 5150, **any person who is authorized to take that person, or cause that person to be taken, into custody pursuant to that section shall consider available relevant information about the historical course of the person's mental disorder if the authorized person determines that the information has a reasonable bearing on the determination as to whether the person is a danger to others, or to himself or herself, or is gravely disabled as a result of the mental disorder.***

*B. For purposes of this section, **"information about the historical course of the person's mental disorder" includes** evidence presented by the person who has provided or is providing mental health or related support services to the person subject to a determination described in subdivision (a), **evidence presented by one or more members of the family of that person,** and evidence presented by the person subject to a determination described in subdivision (a) or anyone designated by that person*

*C. If the probable cause in subdivision (a) is based on the statement of a person other than the one authorized to take the person into custody pursuant to Section 5150, a member of the attending staff, or a professional person, **the person making the statement shall be liable in a civil action for intentionally giv-***

ing any statement that he or she knows to be false.

D. This section shall not be applied to limit the application of Section 5328.

Cal. Welf. & Inst. C. §5152: Evaluation; treatment and care; written and oral information on effects of medication; release or other disposition

(a) Each person admitted to a facility for 72-hour treatment and evaluation under the provisions of this article shall receive an evaluation as soon as possible after he or she is admitted and shall receive whatever treatment and care his or her condition requires for the full period that he or she is held. ***The person shall be released before 72 hours have elapsed only if the psychiatrist directly responsible for the person's treatment believes, as a result of the psychiatrist's personal observations, that the person no longer requires evaluation or treatment.*** *However, in those situations in which both a psychiatrist ...*

(b) Any person who has been detained for evaluation and treatment shall be released, referred for further care and treatment on a voluntary basis, or certified for intensive treatment, or a conservator or temporary conservator shall be appointed pursuant to this part as required.

Cal. Welf. & Inst. C. §5250: Time limitation or certification for intensive treatment; grounds for certification

If a person is detained for 72 hours under the provisions of Article 1 (commencing with Section 5150), or under court order for evaluation pursuant to Article 2 (commencing with Section 5200) or Article 3 (commencing with Section 5225) and has received an evaluation, he or she may be certified for not more than 14 days of intensive treatment related to the mental disorder or impairment by chronic alcoholism, under the following conditions:

(a) The professional staff of the agency or facility providing evaluation services has analyzed the person's condition and has found the person is, as a result of mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled.

(b) ...

(c) The person has been advised of the need for, but has not been willing or able to accept, treatment on a voluntary basis.

(d) (1) Notwithstanding paragraph (1) of subdivision (h) of Section 5008, ***a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.***

Cal. Welf. & Inst. C. §5270.10: Legislative Intent

It is the intent of the Legislature to reduce the number of gravely disabled persons for whom conservatorship petitions are filed and who are placed under the extensive powers and authority of a temporary conservator simply to obtain an additional period of treatment without the belief that a conservator is actually needed and without the intention of proceeding to trial on the conservatorship petition. *This change will substantially reduce the number of conservatorship petitions filed and temporary conservatorships granted under this part which do not result in either a trial or a conservatorship.*

Cal. Welf. & Inst. C. §5270.35. Certification; length of intensive treatment; termination; release of patient

(a) A certification pursuant to this article shall be for no more than 30 days of intensive treatment, and shall terminate only as soon as the psychiatrist directly responsible for the person's treatment believes, as a result of the psychiatrist's personal observations, that the person no longer meets the criteria for the certification, or is prepared to voluntarily accept treatment on a referral basis or to remain on a voluntary basis in the facility providing intensive treatment. *(b) Any person who has been certified for 30 days of intensive treatment under this article,* ***shall be released at the end of 30 days unless one or more of the following is applicable:***

> ***(1) The patient agrees to receive further treatment on a voluntary basis.***
>
> ***(2) The patient is the subject of a conservatorship petition filed pursuant to Chapter 3 (commencing with Section 5350).***
>
> *(3) The patient is the subject of a petition for postcertification treatment of a dangerous person filed pursuant to Article 6 (commencing with Section 5300)....*

Cal. Welf. & Inst. C. §5270.10: Knowing and willful detention of a person; civil damages

Any individual who is knowingly and willfully responsible for detaining a person for more than 30 days in violation of the provisions of Section 5270.35 is liable to that person in civil damages.

Supreme Court, U.S.
FILED
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No. 05-791

IN THE
Supreme Court of the United States

JEFFREY R. GOLIN, ELSIE Y. GOLIN, NANCY K. GOLIN
Petitioners

v.

CLIFFORD B. ALLENBY, DIRECTOR DEPARTMENT OF DEVELOPMENTAL SERVICES, STATE OF CALIFORNIA, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; H. DEAN STILES (OFFICE OF LEGAL AFFAIRS OF CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES) IN HIS INDIVIDUAL AND PERSONAL CAPACITY, COUNTY OF SANTA CLARA; JAMIE BUCKMASTER (SANTA CLARA COUNTY ADULT PROTECTIVE SERVICES; JOSE VILLAREAL, MALORIE M. STREET (SANTA CLARA COUNTY OFFICE OF PUBLIC DEFENDER) EACH IN THEIR OFFICIAL, INDIVIDUAL AND PERSONAL CAPACITIES; SAN ANDREAS REGIONAL CENTER, INC. ("SARC"); SANTI J. ROGERS, MIMI KINDERLEHRER, TUCKER LISKE (SAN ANDREAS REGIONAL CENTER), EACH IN THEIR INDIVIDUAL AND PERSONAL CAPACITIES; NANCY J. JOHNSON (BERLINER COHEN); CITY OF PALO ALTO; LORI KRATZER (PALO ALTO POLICE DEPARTMENT) IN HER OFFICIAL AND INDIVIDUAL CAPACITY; EMBEE MANOR, EDNA MANTILLA IN HER INDIVIDUAL AND PERSONAL CAPACITY; AND DOES 1-50, DEFENDANTS-APPELLEES.
Respondents

On Petition for a Writ of Certiorari
To The United States Circuit Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Supreme Court Rule 15.8, petitioners respectfully submit this supplemental brief to call the Court's attention to a new judicial decision, and a relevant new judicial investigative study, that were not available at the time of the party's last filing.

INTERVENING MATTERS

I.

UNITED STATES V. GEORGIA, JUST DECIDED BY THIS COURT, ALLOWS PETITIONERS TO RENEW PURSUIT OF CLAIMS I & II FOR PRIVATE RIGHT OF ACTION FOR §1983, CIVIL RIGHTS VIOLATIONS, AND §1985 CONSPIRACY TO INTERFERE WITH VIOLATIONS OF CIVIL RIGHTS UNDER 14TH AMENDMENT

One of the principal issues presented by the Petition implicates the private right of action for civil rights under 42 U.S.C. §1983, and interference with civil rights under 42 U.S.C. §1985(3), for disabled persons under the Americans with Disabilities Act (ADA), 42 U.S.C. §12131 *et seq.*

Petitioners have now learned that on January 10, 2006, this Court handed down its opinion in *United States v. Georgia*, 126 S.Ct. 877 (2006). The holdings of this intervening watershed opinion materially affect the outcome of Count I (42 U.S.C. §1983, Violation of Civil Rights) (AOB p35-39), and Count II (42 U.S.C §1985) (Pet. App. a43), Conspiracy to Interfere with Civil Rights) (AOB p40-46) of petitioners' claim in this civil rights case.

This Court in *United States v. Georgia* expanded upon the narrow ground tenuously held previously in *Tennessee v. Lane*, 541 U.S. 509 (2004). In *United States v. Georgia* this Court explained that Title II of ADA *may* be viewed as a valid exercise of Congress' Fourteenth Amendment Section 5 enforcement powers "insofar as Title II creates a private cause of action under §1983 for damages against the States for conduct that *actually* violates the Fourteenth Amendment", validly abrogating Eleventh Amendment State Sovereign Immunity claims. It did not reach the corollary conclusion that ADA also confers relief in cases for *interference* with civil rights under §1985, but

nevertheless points to that implication. Here, the court below did not validate any of the Petitioners' federal claims, including Counts I and II.

Petitioners in their October 23, 2003 opening brief in District Court alleged and pleaded supporting facts that the respondent state actors violated 42 U.S.C. §§1983 and 1985 (AOB pp40-46) when they conspired under color of law to interfere with the civil and constitutional rights of Nancy Golin and her parents *on the basis of discrimination against the handicapped* and more particularly against the developmentally disabled. The parents alleged facts that state actors conspired to have Nancy Golin removed from her family and keep her in unlawful detention without due process, exigency or probable cause, and deprived her of her rights *inter alia* under the First, Fourth, Fifth, Sixth, and Eighth Amendments, extended to the States by the due process clause of the Fourteenth Amendment, including but not limited to freedom from unreasonable seizure and interference with familial relationships.

Respondents Allenby and Stiles via the State Attorney General's Office, filing on February 4, 2004 their motion to dismiss to the District Court under FRCP Rule 12(b)(6) (DC #20), invoked an Eleventh Amendment claim of sovereign immunity, whereupon petitioners countered on February 20, 2004 (DC #39, pp11-12) with arguments not very unlike those pleaded by the petitioner in *United States v. Georgia*.

Respondent Johnson argued in her Joinder Motions with the City of Palo Alto and motions to dismiss (DC 35, 36, 37) and in her Ninth Circuit response brief (AC 1/20/05), that developmentally disabled persons have not been found to constitute a protected class for purposes of §1985(3), and petitioners again countered with case law following the passage of ADA that *granted* protected class status to §1985(3) litigants, and reiterated that claim in their lodged Appellants' Reply Brief (ARB pp37-39), which the Ninth chose to deny filing in the record despite timely submission (AC 2/23/05).

The District Court failed to reach the issue of State sovereign immunity in its opinion (Pet. App. a7), and ig-

nored Count II without comment, as detailed in the parents' petition for certiorari, and similarly ignored all other valid federal claims in the complaint. So did the Ninth Circuit, in their June 22, 2005 three-judge panel decision (Pet. App. a4).

In District Court, the petitioners argued:

> "... we cited *Larson by Larson v. Miller*, 55 F.3d 1343, (8th Cir. 1995) (We believe that §1985(3)'s pr otection extends to the handicapped as a class as well as to females.") In *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir.1982), the Second Circuit extended § 1985(3) protection to the class of mentally retarded individuals, noting that "[c]ases since *Griffin v. Breckenridge*[1] have been generous in applying section 1985(3) to nonracial classifications, even though some of the classifications would not receive strict scrutiny under the equal protection clause." *Id.* at 42. *See also Trautz v. Weisman*, 819 F.Supp. 282, 290-295 (S.D.N.Y.1993); *Tyus v. Ohio Dept. of Youth Services*, 606 F.Supp. 239, 245-47 (S.D.Ohio 1985).
>
> "The definitive case at this point on this subject is *Lake v Arnold*, 112 F.3d 682 (3rd Cir. 1997), discussed in 12 No. 9 FEDLIT 250 Federal Litigator, "*Civil Rights - Conspiracy to Deny - Mentally Retarded Persons*", September 1997, reaching the conclusion that "Mentally retarded, as a class, are entitled to protection afforded by civil rights conspiracy statute. 42 U.S.C. §1985(3)".

Following the District Court's dismissal and at the beginning of the appeal, on May 17, 2004, this Court handed down *Tennessee v. Lane*, 541 U.S. 509 (2004), which held Congress' power to validly abrogate state sovereign immunity stood on very narrow grounds related to public handicapped access to courthouses. *Lane* meant that petitioners were previously unable to vigorously pursue their §§ 1983,1985 claims without unresolved questions about state sovereign immunity.

United States v. Georgia was not decided until January 10, 2006, after the Court of Appeals dismissal, during the

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[1] *Griffin v. Breckenridge*, 403 U.S. 88 (1971)

pendency of this petition.

This Court explained in *United States v. Georgia*, *supra* that:

> "In enacting the ADA, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment ... ." 42 U.S.C.§ 12101(b)(4). Moreover, the Act provides that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." §12202."

Now that this Court has decided that the ADA confers rights to handicapped persons enforceable by private actions under 42 U.S.C. §1983 for *actual* infringement of *rights*, it must by extension be concluded that *interference* by state actors under color of law with those rights under ADA must also be enforceable by private rights of action, under §1985(3). This makes it clear that handicapped persons must now as a class be entitled to protected status for interference with civil rights by state actors under the ADA, and this Court should settle the conflicts below and establish the inclusion of §1985(3)[2].

II.

THREE YEAR INVESTIGATIVE STUDY OF WIDESPREAD JUDICIAL ERROR AND MISCONDUCT IN SANTA CLARA COUNTY STATE COURT SYSTEM, BY SAN JOSE MERCURY NEWS, REINFORCES PETITIONERS' CLAIMS OF SUBSTANTIVE DUE PROCESS VIOLATIONS DURING THE COURSE OF CONSERVATORSHIP PROCEEDINGS.

On January 22, 2006, after petitioners' initial filing, the San Jose Mercury News began a daily five part inves-

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[2] The following argument lies beyond the scope of a Supplemental Brief, but in light of *Olmstead v L.C. by Zimring*, 527 U.S. 581 (1999) *("institutionalization is segregation by virtue of disability")*, and its progeny, *United States v. Georgia* now points towards establishing that the ADA confers private rights of action under §§1983, 1985 against states in vindication of wrongful institutionalization or related constitutional wrongs, where federal claims of *actual violations* of the 14th Amendment are invoked, abrogating Eleventh Amendment sovereign immunity.

tigative series, "Tainted Trials, Stolen Justice"[3], based on a three year study of trials and 700 appeals in Santa Clara County Superior Courts and the California Sixth Appellate District, the same court system that petitioners' District Court Judge Hon. William H. Alsup held in his March 23, 2004 dismissal hearing was infallibly able to root out errors during the course of proceedings and was therefore without necessity of supervision by the federal courts. Judge Alsup himself is quoted in these articles recently reviewing a Sixth District case, critically stating that there were five errors by the Sixth District Court that were "absolutely devastating" to the defense[4].

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[3] "Tainted Trials; Stolen Justice", in *San Jose Mercury News*, by Fredric Tulsky: Part I (January 22, 2006): "Review of more than 700 cases reveals problems throughout the justice system"; Part II (January 23, 2006): "Prosecutors over the line"; Part III (January 24, 2006): "High Cost of Bad Defense"; Part IV (January 25, 2006): "How Judges Favor the Prosecution"; Part V (January 26, 2006): "Last Chance, Little Hope", series available online at: http://www.mercurynews.com/mld/mercurynews/news/special_packages/stolenjustice/

[4] The study focuses on criminal procedures. Criminal convictions are appealed to the same Sixth District State Appellate court which had jurisdiction over petitioners' probate appeal here, which erected an bar to petitioner's state appeal by denying transcripts. The same public defender's office headed by defendant Villareal (now Mary Greenwood) to which Ms. Street, who was supposed to represent Nancy Golin's interests, reports, represents the defendants' interests in these criminal procedures. "Santa Clara County was selected as one of the pilot projects for developing the Unified Court model". (Source: *"The Unified Court: Interview with The Hon. Leonard P. Edwards"*, Family Law News, *Judicial Survey*, Vol. 17, No. 3, (2005) by Jennifer Jackson). "Judges, ... rotate within the unified court and continue to deal with families." Hon. Thomas Edwards (brother of cited Hon. Leonard Edwards of dependency court) had just rotated to the probate bench and awarded temporary conservatorship of Nancy to the state on February 4, 2003, replacing an experienced probate judge (Hon. Catherine Gallagher) who had made a number of favorable interlocutory decisions in this case, was unfamiliar with probate, but *Judge Martin* had previously served in criminal and civil proceedings. The parents challenged Judge Thomas Edwards and he recused himself, and was eventually replaced by the probate trial Judge William Martin, who had no previous experience in conservatorship cases in probate and no prior knowledge of the petitioner's case or conservatorship law and had only one weekend to study the case, but was an experienced prosecutor with the DA's office and had served many years as judge in criminal and civil proceedings. Judges in Santa Clara County therefore bear the title "APJ" (All Purpose Judge) because they may serve any role including criminal and rotate frequently within the Superior Court system.

The San Jose Mercury News report found that there are significant and systemic errors in the Superior Courts of Santa Clara County. The report reinforces the credibility of the petitioners' claims by clearly describing systemic failures which mirror wrongs described by the petitioners, particularly their claims to denial of due process and unreasonable findings in light of the evidence presented or subpoenaed in the conservatorship court. This helps underscore the fundamental judicial error of the District Court, argued in Petitioner's petition for certiorari (at pp 21-23), taking judicial notice for the truth of disputed extrinsic findings of a state court during a motion by defendants to dismiss on a Rule 12(b)(6) motion, thereby refusing to read the facts in the original complaint as true and in a light most favorable to the plaintiffs.

The report cites the following relevant findings:

- Questionable conduct mars more than one-third of all cases.
- Mistakes at every phase of trial tolerated by appellate court.
- In the worst of examples, defendants are wrongly convicted.
- Errors robbed defendants of a fair trial.
- Problems occurred at every phase of a trial, and in every part of the system.
- In nearly 100 cases, the prosecution engaged in questionable conduct that bolstered its effort to win convictions.

The article summarizes further findings:

"• **Defense attorneys.** In 100 cases, defense attorneys acted in ways that harmed their clients. In nearly 50 cases, the attorneys failed to take the most basic of measures, from properly investigating their case to presenting the evidence they gathered. Defense attorneys failed in dozens more cases to object as prosecutors or judges engaged in questionable conduct, in effect excusing the mistakes.

"• **Trial judges.** In more than 150 cases, judges made missteps or questionable rulings that favored the prosecution. Violating legal precedents, trial judges allowed evidence that unfairly tainted defen-

dants and prohibited evidence that might have supported their defense. Repeatedly, judges failed to properly instruct jurors on legal principles, instead offering direction that made a guilty verdict more likely.

"• **The appellate court.** The 6th District Court of Appeal, the primary court of review for Santa Clara County cases, upheld verdicts in more than 100 cases even as it acknowledged errors had occurred. The appellate court simply concluded those errors made no difference in the outcome of the case. Sometimes those conclusions were appropriate, but a review of the appellate record and consultations with experts established that in more than 50 cases the court misstated facts, twisted logic and devised questionable rationales to dismiss the error.

"In nearly all the cases, the 6th District designates its opinions as ``not to be published" -- a distinction that means they are not to be cited as legal authority in subsequent cases, and thus have little relevance beyond the parties to a case. The Mercury News found that higher courts are extremely unlikely to review unpublished opinions, making the 6th District the final word on most criminal trials in Santa Clara County.

"The unpublished designation also has served to shield the cases from outside review. Past academic and journalistic studies of criminal justice, here and elsewhere, have examined published opinions, even though they represent a tiny proportion of court decisions. The Mercury News review is unprecedented in its comprehensive analysis of criminal decisions, published and unpublished alike.

"State court statistics show the 6th District over time has published a smaller portion of its criminal cases -- 2 percent -- than any other appellate district in the state. The statewide average is 4 percent.

"Taken together, the Mercury News findings offer a picture of a system that often turns on its head the presumption that defendants are innocent until proven guilty. Prosecutors, defense attorneys, judges

and appellate justices often act in ways that cause defendants' rights to be violated.[5]

"The newspaper study points to a ``skewed system that disproportionately bends over backward to help the DA win," said Bennett Gershman, a former prosecutor and professor of criminal law at Pace University School of Law who has written on prosecutorial and judicial ethics. ``Admitting and excluding evidence unevenhandedly and overlooking serious errors is not a pretty state of affairs if one is concerned about fair trials. Nor if one is concerned about the appearance of justice."

"Another outside check on the system -- media at-

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[5] The facts of this case illustrate dramatically the endemic improprieties reported by the Mercury News. From November 2001 onwards, as narrated in the petitioning brief, and as alleged in petitioners' Original Complaint (Oct. 23, 2003), the respondents acted in consort to involuntarily and forcibly institutionalize petitioner Nancy, in violation of state statutory due process safeguards protecting the civil rights of developmentally disabled persons. Especially egregious was the improper application of the conservatorship statutory scheme. Initially wrongly applied by attempting to involuntarily detain her under statutes intended to provide "gravely disabled" persons *without* family or friends, *excluding* developmentally disabled persons, (Cal. Welf. & Inst. C. §§5150, 5250); subsequently by refusing to abide by statutes *requiring* release and disclosure of injuries and abuses, and then by transferring Nancy without any statutory authority and then fraudulently restraining her under authority of another statute (Cal. Welf. & Inst. C. §4500 et seq) intended to provide *voluntary assistive* state funded services (Lanterman Developmental Disabilities Services Act), and then by entirely *excluding* the family and the developmentally disabled person from mandatory statutory cooperative planning procedures. Notwithstanding these attempts, another statutory framework was tried (Cal. Hlth. & S. C. §§416.5, 416.9) - intended to conserve persons, desiring protection of the state and *abandoned* by their family or friends, in contradiction of statutory due process safeguards (Cal. Hlth. & S. C. §416.23) where family or friends *were* available to assist. A fourth statutory framework, the "limited conservatorship" scheme finally employed (Cal. Prob. C. §1801 et seq), again intended to be supportive and voluntary to developmentally disabled persons desiring state sponsored assistive services "only to the extent and nature required" to help them achieve greater independence, was transformed into an *involuntary* institutionalization scheme to avoid due process situations where a family or friends were available (Cal. Welf. & Inst. C. §§4502, 4503).

tention -- also has largely failed. The few defendants with money or connections often can command attention for their complaints against the system. But the overwhelming number of cases in the Mercury News examination, even involving the most serious allegations of error or misconduct, have received scant publicity, if any."

Further, the report underscores the paramount necessity of appellate review. This case *has never been granted review* of any of its claims (regarding the three periods narrated in the petitioning brief -removal, illegal confinement, and the subsequent conservatorship trial) in any state court. Yet, the disputed extrinsic findings (which were never subject to state appellate review) were nonetheless substantially relied upon by the Ninth Circuit and the Court of Appeals in their denials of jurisdiction.

CONCLUSION

Additional reasons for granting the petition are further justified by intervening case law and public investigation by a reputable journalistic organization, providing more reasons why review should thus be granted.

Respectfully submitted,
February 22, 2006

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PETITIONERS' SECOND SUPPLEMENTAL BRIEF

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PETITIONERS' SECOND SUPPLEMENTAL BRIEF

The Petitioners, Jeffrey R. Golin, Elsie Y. Golin, and their daughter Nancy K. Golin respectfully submit this supplemental brief, caused by the Court's hearing of oral argument on February 28th, 2006 *in Marshall v. Marshall*, Supreme Court No. 04-1544, subsequent to the February 22, 2006 filing date for responses to the petitioner's initial December 14, 2005 petitioning brief ("Pet."). Because the arguments of the petitioner in *Marshall*[1] are strikingly similar to many of the core questions within the Golin's petitioning brief, the Golins suggest that the Court's decision regarding their petition for writ of certiorari would rely on many of the same conclusions which may be reached only after the Court has considered the oral arguments and briefs presented in *Marshall*.[2]

This Court's pending decision in *Marshall* is likely to resolve jurisdictional issues related to the Ninth Circuit's denial of jurisdiction to the petitioning Golins, as well as the petitioner in *Marshall*. Both cases involve federal courts' exercise of congressionally mandated federal jurisdiction in suits related to state probate proceedings. The *Marshall* decision may clarify federal jurisdiction in matters related to the probate exception, the domestic relations exception, preclusion and abstention, and lines of cases involving *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (domestic relations exception) and most recently *Exxon Mobil v. Saudi Basic Industries, Inc.*, 125 S. Ct., 1517 (2005) (*Rooker-Feldman* abstention) (*see* Pet. 12). Both *Marshall* and the instant case may settle three decades (post *Monroe v. Pape*, 365 U.S. 167 (1961), and

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[1] *In re Marshall*, 392 F.3d 1118 (9th Cir., 2004).

[2] The February 28 oral arguments in *Marshall* came after the February 22 expiration of Respondents' time to file Briefs in Opposition. Here after respondents sought and were granted a 30 day extension of time to file Briefs in Opposition, two of the respondents who had declared their intention to file waived their right, eliminating petitioners' opportunity to file a reply brief that might have addressed this question. On March 6, 2006, the petitioners submitted a Motion to Defer, pending the outcome of *Marshall*. The Court suggested the Motion to Defer be submitted as this Supplemental Brief. Both the Motion and this Supplemental Brief are caused by the intervening oral arguments in *Marshall*.

Mitchum v. Foster, 407 U.S. 225 (1972)) of judge-made state's-rights experimentation with abstention and preclusion deference to merely related state court proceedings.

INTERVENING MATTERS

i. *MARSHALL V. MARSHALL*

In *Marshall v. Marshall*, the facts, legal questions and arguments are significantly similar to *Golin v. Allenby*. The question at the heart of *Marshall* is the validity of a state probate guardianship/conservatorship proceeding of billionaire Howard Marshall II, ("Howard") by his son E. Pierce Marshall ("Pierce"), which stripped Howard of all his assets before his death, in which the parties allegedly engaged in questionable misconduct resulting in damages comprehensively reviewed in a federal bankruptcy court, and overturned in the Ninth Circuit on jurisdictional grounds almost identical to those appealed here.

The original Petition for Certiorari in *Golin v. Allenby* was filed with this Court and presented four questions.

The petitioners' first question challenged the understanding of the *Younger* doctrine asserted by the District Court. The District Court claimed that federal courts were prohibited from enjoining and interfering with "*ongoing*" state proceedings. The District Court dismissed *inter alia* on *Younger* grounds (Pet. a16). The Ninth Circuit Court affirmed, failing to inform its reasoning with any reference to this Court's recent narrowing in *Exxon-Mobil, supra*, of the scope barring federal *reversals* of related state court decisions applying *Rooker-Feldman* doctrine.

This same question of scope is raised in *Marshall* within its first question presented, "[W]hat is the scope of the probate exception to federal jurisdiction" (and in the related subsequent next two questions presented).

As petitioners argued in Petition Argument III (Pet. 16, 26 *et. seq.*), since the state court proceeding was of a fundamentally different nature and jurisdiction, (*i.e.*, whether to conserve Nancy Golin and who should conserve her), from the petitioners' civil rights lawsuit for tortious damages, injuries, substantive due process violations, procedural and constitutional wrongs, there could be no actual *Younger* interference. The relief, petitioners argued (*see* Pet. 28), was not available in the state probate court to re-

solve federal issues of civil rights or tort damages under Section 1983 (42 U.S.C. §1983), and the probate court expressly refused to hear them (Pet. 8).

The District Court, citing *Guardianship of Kemp*, 43 Cal. App. 3d 758, 766 (1974), (following *Browne v. Superior Court of San Francisco County*, 43 Cal.App.3d 758 (1940)), claimed in support of it's *Younger* first prong analysis that the state probate court *indefinitely* maintained *ongoing* post-appointment jurisdiction over the conservatorship (*see* Pet. a16) that precluded any jurisdiction over federal *civil rights* in federal courts[3] in the same sense that applied to *Younger*.

The District Court opinion, ratified by the Ninth, *ab initio* declared that the "domestic relations exception" (Pet. a17) applied. This fundamentally mischaracterized the Golins' factual basis. More likely, the District Court's use of an "exception" should have referred to the "probate exception." The District Court apparently *misidentified the claimed exception*. Since the District Court heavily relied on the probate court decision, the only exception it could have reasonably intended to invoke was the probate exception – also at issue in *Marshall*.

Further compounding its error, the District Court termed this a "child custody matter" (Pet. 17, 18, a29, a33). The troublesome ambiguity is contained in the undifferentiated words, "child" and "custody." An adult child, unable to exercise independence, may become the subject of adjudication in a conservatorship or guardianship proceeding, which lie within the jurisdiction of a state probate court. And thus literally associated with "probate", rather than "domestic relations." As viewed by this Court in *Ankn-*

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[3] The District Court argued that federal jurisdiction also did not lie due to domestic relations, *Rooker Feldman* and standing issues. The District Court on oral record declared that petitioners "did not have standing... that *Rooker-Feldman* applies and that abstention applies" (AER-V10), and simplistically conflated all past and potential proceedings, state or federal, without discrimination, including criminal, probate, civil and federal civil rights, and cases arising under the Constitution, into one consideration: "was there 'a trial'" and did the petitioners win or lose (AER V15), and on that basis termed the petitioners case, "this case is frivolous. It's frivolous...It's frivolous in this court." (*See* DC transcripts, AER V-19.

brandt, the "domestic relations exception" is limited to "divorce, alimony or child custody matters. Viewed in this light, the "domestic relations" exception, claimed by the District Court, is simply inappropriate. However, because similar reasoning is employed to justify the probate exception[4], this Court's reasoning in limiting the use of the "domestic relations exception" are equally applicable to the unidentified "probate exception" apparently employed by the District Court in *Golin*, and expressly employed by the District Court in *Marshall*.[5]

Alternately, in *Golin* the District Court may have intentionally broadened the breadth and scope of the domestic relations exception in order to engulf the probate exception. Respondents had invoked the pre-*Ankenbrandt* case, *Hemon v. Office of Public Guardian*, 878 F.3d 13 (1st Cir. 1989) (probate guardianship) (County Appellee's Response Brief, p26) which previously was followed solely by the First Circuit (AOB 43, 60). Whether this indirect inclusion of probate procedures via *Hemon's* authority justifies the Ninth Circuit's reliance on the domestic relations exception is another facet of the exception question. And underscores the confusion caused by the Ninth Circuit's reliance on these exceptions in both *Golin* and *Marshall*.

Most importantly, *Marshall* and *Golin* appear to present almost perfectly analogous issues, the only difference being that in *Marshall* the federal jurisdiction arises from the Federal Bankruptcy Code (28 U.S.C. §1334) and in *Golin* it arises from the Federal Civil Rights Statute 28 U.S.C. §1343, or 28 U.S.C. §1331 (federal question jurisdiction) (Pet. 1).

In *Marshall*, the Ninth Circuit held that the Texas state probate court decision favoring the respondent precluded jurisdiction by the California Federal *bankruptcy* court decision favoring the petitioner. The federal bankruptcy court in *Marshall* found that Pierce had engaged in similar

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[4] *See Marshall*, Appellate Brief, 2005 WL 3156909 (U.S.), p26; *infra* 6

[5] On that erroneous ground the District Court denied the concurrent Petition for Habeas Corpus (DC 03-05855) on jurisdictional grounds as well (Pet. a31 *et seq*), incorrectly citing *Lehman v. Lycoming County Children's Services*, 458 U.S. 505-11 (1982) with roots in the domestic relations exception to *minor* child custody matters.

tortious interference with due process and "massive discovery abuse" in the probate court tortiously interfering with Vickie's expectation of an *inter vivos* gift promised her by Howard during their brief marriage, and that the probate court reached findings that went far beyond the scope of their jurisdiction at Pierce's urging to attempt to oust the jurisdiction of the federal courts, and that the probate court alleged that the Petitioner's claims were frivolous.

In *Golin,* the Ninth Circuit held that the California state probate court decision favoring Allenby precluded federal jurisdiction. The petitioners had argued that the probate court conservatorship decision did not preclude federal court jurisdiction over the instant *Section 1983 civil rights* lawsuit for damages, and invoked a "virtually unflagging obligation ...[for federal courts] to exercise the jurisdiction given them", *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976), AOB 55:

> "A 'probate exception' to federal jurisdiction does not exist here. On March 14, 2004, the parents cited *Markham v. Allen*, 326 U.S. 490 (1946) (*'the probate limitation prohibits a federal court only from probating a will or administering an estate'*).[6] A search of 'probate exception' cases uncovered none that considered a disputed conservatorship of the person as falling within the exception."

(Pet. 16, Appellants' Reply (Motion to Strike) to Mantilla, March 15, 2004, at p2)

Marshall expressly raises the "probate exception", relating to the reasoning of the Ninth Circuit in *Golin.*

While in *Golin* the "probate exception" challenge was not *per se* raised in the District Court, it appears fundamental to the Court's reasoning, and it was raised in a Response Motion by appellee Mantilla in the Circuit Court, on January 19, 2004, to which Petitioners replied on March 15, 2004, citing *Markham, and Marshall v. Marshall,* [392 F.3d 1118 (2005)] *(slip copy).*

In *Golin*, the Ninth Circuit expressed no opinion on the

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[6] *See* 39 Fed. B. News & J. 579, "*Federal Probate Jurisdiction-Examining the Exception To The Rule*", Federal Bar News and Journal, November/December, 1992, Gregory C. Luke and Daniel J. Hofheimer.

"probate exception" question but did hold that the "domestic relations" exception barred review. In *Marshall* the petitioner argued that the two exceptions rely on the same justifications, and application of the "cognate doctrine," should result in the analysis of *Ankenbrandt* ("domestic relations exception") applying equally to both exceptions, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), arguing:

> "*Ankenbrandt* compels a similar holding here... whatever its legitimacy or scope, a domestic relations exception to federal jurisdiction does not encompass a tort claim between diverse parties seeking damages...if an Ankenbrandt-type analysis were applied here, it would operate so as to preclude any extension of the limits that this Court has imposed on federal jurisdiction over probate-related matters. "(Marshall Brief*, at p26).

As pointed out in petitioner's Petition for Certiorari, the Ninth merely deferred to the District Court's opinion that the parents lacked standing to represent their daughter as next friends or *guardians ad litem*.[7] The District Court reasoned that it lacked jurisdiction to review a state probate court's conservatorship appointment that denied parents/petitioners standing to represent their daughter in federal court on a civil rights and liability lawsuit for damages. *The District Court's decision totally (and improperly) deferred to the probate decision on jurisdictional grounds*, judicially noticing disputed extrinsic probate court findings at the pleading stage (Pet. 21-23). *In so doing, it essentially invoked the "probate exception", albeit without expressed reference. This absolute deference* resulted in denial of the parents' standing, by acknowledging the probate court's conservatorship's preclusive effect of standing.

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[7] The docket caption for this petition reads *"Elsie Golin, et vir"* (and husband) - using a citation style normally associated with family courts. Petitioners Nancy Golin and her father, Jeffrey Golin were both recognized as parties in the Ninth Circuit and District Courts. The current caption furthers the confusion surrounding the nature of the Golin's claims, conforming to the opinion of the Ninth Circuit that is now under review, rather than to the caption page of *that* opinion (Pet. a3), which identifies all three members of the Golin family as plaintiffs/appellants. Identification of all three members as plaintiffs/appellants would accurately represent the interests at stake, especially since this is a federal civil rights case involving the rights of a handicapped adult.

The scope and breadth of the exclusivity rule applied by the Ninth Circuit is extraordinary. A grant of exclusive standing rights of personal representative to conservators in any court proceeding seemingly precludes any federal party to seek redress in any federal court.

Thus, the denial of petitioners' representation of their daughter hinged on the Ninth's preclusive acceptance of the state conservatorship, and this blanket refusal to deem them "next friends" or to permit petitioners as parents to represent their daughter's interests is actually grounded in judicial deference of the "probate exception."

ii. THIS COURT SHOULD REAFFIRM THE LONG-ESTABLISHED RESOLUTION OF THE JURISDICTIONAL CONFLICT, POSED BY *MARSHALL* AND THE INSTANT CASE, BETWEEN CONGRESSIONALLY MANDATED FEDERAL JURISDICTION, AND STANDING PRECLUSION IMPOSED HERE BY STATE PROBATE COURTS IN GUARDIANSHIP/CONSERVATORSHIP PROCEEDINGS.

The arguments within the *Marshall* briefs[8] provide guidance (*see*, fn 9) as to the extent of Congress's power to enact federal jurisdiction (*Marshall v. Marshall*, U.S. Supreme Court Appellate Brief, 2005 WL 3156909 (U.S.), pp 44-46).

> "This approach – under which state probate laws dictate the scope of federal jurisdiction – has been repeatedly rejected by this Court. This Court has said:
>
> > 'We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.'
>
> 'Payne *v. Hook*, 74 U.S. 425, 430 (1868).
>
> > "'[I]nasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts ...

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[8] *Marshall*, Appellate Brief, 2005 WL 3156909 (U.S.).

> the jurisdiction may be exercised, and is not subject to the limitations or restraint by state legislations establishing courts of probate and giving them jurisdiction over similar matters.'
>
> "*Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909).[9]
>
> > "'This Court's precedents, thus, hold that because federal jurisdiction is created by federal statute, it cannot be impaired by state law. These precedents are fundamentally inconsistent with the approach of the Ninth Circuit and other federal courts of appeals, which makes the scope of federal jurisdiction entirely dependent on state legislative choices concerning the internal organization of state courts.'"(*Id.*)

Further, (*Id*[10] at 46):

> "*Sutton*[11] and *O'Callighan*[12], thus, expressly permit states to *expand* federal jurisdiction, but not to *shrink* it. Interpreting *Sutton* and *O'Callighan* as the Ninth Circuit and other courts have done – to allow state law to expand or contract federal jurisdiction – is thus simply wrong. It also creates profoundly troubling results.
>
> "Under the Supremacy Clause[13], 'if there is any conflict between federal and state law, federal law shall prevail.'

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[9] "According to *McClellan v. Carland*, 217 U.S. 268, 281 (1910) (constitutional and statutory grants of federal jurisdiction cannot "be impaired by subsequent state legislation creating courts of probate"); *Hayes v. Pratt*, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United Sates to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction"), *Lawrence v. Nelson*, 143 U.S. 215, 223-24 (1892) (same); *Clark v. Bever*, 139 U.S. 96, 102 (1891) (states cannot preclude federal jurisdiction by assigning exclusive jurisdiction over probate-related claims to its courts, because "no such result can be constitutionally effected.");' *Borer v. Chapman*, 119 U.S. 587, 600 (1887) (federal jurisdiction "cannot be affected by any legislation except that of the United States"); *Hess v. Reynolds*, 113 U.S. 73, 77 (1885) ("[The] jurisdiction of the courts of the United States...cannot be ousted or annulled by statutes of the States, assuming to confer it exclusively on their own courts."); *Barrow v. Hunton*99 U.S. 80, 85 (1879) (same); *Green's Adm'x v. Creighton*, 64 (23 How.) 90, 107-08 (1859) (same)."

[10] *Marshall*, Appellate Brief, 2005 WL 3156909 (U.S.)

[11] *Sutton v. English*, 246 U.S. 199 (1918)

[12] *O'Callaghan v. O'Brien*, 199 U.S. 89 (1905)

[13] *See* Pet., a-11, p. 25 (fn 45), citing Supremacy Clause here.

Gonzales v. Raich, 125 S. Ct. 2195, 2212 (2005); *Gade v Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). ([U]nder the Supremacy Clause ... 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield'")

And at *Marshall* Brief[10], p47:

"The Ninth Circuit stated: 'The probate court ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against E. Pierce Marshall. *That ruling was binding on the United States district court.*' (*Id.*, 35) (emphasis added)....

"Because federal courts always have jurisdiction to determine their own jurisdiction, another court's jurisdictional analysis can never deprive them of that right. *The Ninth Circuit held directly to the contrary.*" (emph added) (as they did in *Golin*).

In the *Marshall* analysis lie conclusions (often similar to the petitioners') regarding the issues brought by the petitioners in *Golin*: probate exception, domestic relations, *Exxon-Mobil*, *Rooker-Feldman*, and standing issues created by federal deference to state court rulings. The pending opinion of this Court in *Marshall* will likely answer many if not all of the standing and jurisdictional issues raised by the instant case.

iii. COULD *MARSHALL* DECISION OPEN DOOR FOR GOLINS' ORIGINAL CLAIMS FOR §1985 FEDERAL *REDRESS AND EQUITABLE RELIEF* JURISDICTION, 28 U.S.C. §§1343(3), 1343(4) AFTER ALL?

Petitioners asserted in this Court (Pet. 13, 15) that their substantive claims here, sought in the District Court to be amended by removing the claim for equitable relief, are not barred by *Rooker-Feldman*, in light of *Exxon-Mobil*, because *inter alia* they do not invite the Court to reverse a "final" state court decision, and the type of relief sought was not available in state probate court. But the Court, post-*Marshall*, could possibly reach another conclusion on that matter, requiring *no amendment* of the Golin's Original Complaint. Federal Section 1985 (42 U.S.C. §1985) Civil Rights jurisdiction for equitable relief to redress *interferences* with civil rights has been statutorily authorized by Congress in the enabling statute for Section 1985, incl.

28 U.S.C. §§1343(3), 1343(4), *see* Pet. a45-a45, as follows:

> "(3) To *redress the deprivation*, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> "(4) To recover damages or to secure *equitable or other relief* under any Act of Congress providing for the protection of civil rights, including the right to vote."
>
> (emph. added)

It was upon a reading of this Statute that petitioners originally believed that they *could* include equitable relief claims in their Original Complaint. This Court in its deliberations in *Marshall* and in its original jurisdiction could *in the alternative* hold that due process procedures were so inadequate in state probate court, *and not "final"*, that petitioners were entitled to invoke federal redress and relief jurisdiction for interference with civil rights - after all. Congress has granted federal jurisdiction for just such a holding. The Court's holdings in *Marshall* could conceivably settle questions that may reach this argument.

CONCLUSION

The questions presented in *Marshall* bear directly upon the relief sought by the petitioners in their Petition for Certiorari. Accordingly, the Golins suggest that a decision regarding their petition may rely significantly upon the Court's consideration of the oral argument and brief, and ultimately upon the Court's pending decision, in *Marshall v. Marshall* (No. 04-1544).

Respectfully submitted,
March 11, 2006

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